88-1135

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

CHARLES LARRANCE,

Petitioner,

v.

THE ILLINOIS HUMAN RIGHTS COMMISSION, et al.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED

I. Does active interference by a state agency with a complainant's pursuit of the proper procedure for litigating his administrative claim deprive the complainant of due process when that interference abrogates the complainant's action by causing the jurisdictional time limit for bringing the action to lapse?

II. Does due process require the nonretroactive application of a new judicial interpretation of a jurisdictional time limit where nonretroactive application would render the complainant's action timely despite the agency's interference?

LIST OF PARTIES

Charles Larrance, Petitioner

The Illinois Human Rights Commission, as successor to the Illinois Fair Employment Practices Commission, Respondent

The Illinois Department of Human Rights, as successor to the Illinois Fair Employment Practices Commission, Respondent*[1]

Macon County Farm Bureau, Respondent

Country Casualty Insurance Company, Respondent

Country Insurance Company, Respondent

Country Mutual Insurance Company, Respondent

Country Life Insurance Company, Respondent

Country Capital Management Company, Respondent

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[1] * The Illinois Human Rights Commission and the Illinois Department of Human Rights are collectively referred to as the FEPC throughout this Petition for Writ of Certiorari.

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No.

In The
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October Term, 1988

CHARLES LARRANCE,

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v.

THE ILLINOIS HUMAN RIGHTS COMMISSION, et al.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Petitioner, Charles Larrance, ("Petitioner") respectfully prays that a writ of certiorari issue to review the Illinois Supreme Court order that denied Petitioner leave to appeal from an order of the Illinois Appellate Court for the Fourth District. The Fourth District order affirmed the judgment of the Fair Employment Practices Commission ("FEPC") dismissing the Petitioner's claim under the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §851 et seq. (1979) ("FEPA") on jurisdictional grounds. The order of the Illinois Supreme Court was entered in this case on October 6, 1988.

OPINIONS BELOW

On February 20, 1987, the Fair Employment Practices Commission("FEPC") issued an order dismissing Petitioner's FEPA action on jurisdictional grounds. On March 1, 1988 the Illinois Appellate Court for the Fourth District issued an order affirming the February 20, 1987 order of the FEPC denying Petitioner's claim. On March 25, 1988, the Illinois Appellate Court for the Fourth District denied Petitioner's Petition for Rehearing of its March 1, 1988 order. On October 6, 1988, the Illinois Supreme Court issued an order denying Petitioner leave to appeal from the appellate court order of March 1, 1988. Copies of the indicated orders are contained in the Appendix attached hereto.

JURISDICTION

On March 1, 1988 the Illinois Appellate Court for the Fourth District issued an order affirming the February 20, 1987 order of the FEPC denying Petitioner's claim. On October 6, 1988, the Illinois Supreme Court issued an order denying Petitioner leave to appeal from the appellate court order of March 1, 1988.

This Petition for Certiorari is timely filed pursuant to 28 U.S.C. §2101(c), being within ninety days of the entry of the Illinois Supreme Court's October 6, 1988 order.

The jurisdiction of this Court is sought pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, §19 of the Illinois Constitution provides in pertinent part:

> All persons with a physical or mental handicap . . . shall be free from discrimination, unrelating to ability in the hiring and promotion practices of any employer.

The Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §851 et seq (1979) (repealed by and reenacted as the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, §1-101 et seq., effective July 1, 1980), is set out in the Appendix hereto.

Pertinent sections of the rules and regulations of the FEPC are also set forth in the Appendix hereto.

STATEMENT OF THE CASE

A. The Proceedings at the FEPC Through the Issuance of the Administrative Law Judge's Recommended Order and Decision.

In August of 1976, while serving as agency manager for Respondent Macon County Country Companies Agency, Petitioner suffered a heart attack. He returned to work full-time in the Spring of 1977. In the spring of 1979, he was informed by several of the board members of the Macon County Farm Bureau who by written agreement with the Petitioner's employer could make recommendations regarding Petitioner's employment, that he was not performing up to his pre-heart attack ability.

On April 27, 1979, Respondents[1] notified Petitioner that his employment with Respondents would be terminated effective at the close of business on May 31, 1979, but gave him no reason for the termination. On May 31, 1979, Respondents did, in fact, terminate the Petitioner. On July 9, 1979, approximately one month following his termination, Petitioner went to the FEPC

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[1] For purposes of the STATEMENT OF THE CASE, the designation "Respondents" refers to Petitioner's employers, Macon County Farm Bureau, Country Casualty Insurance Company, Country Insurance Company, Country Mutual Insurance Company, Country Life Insurance Company, and Country Capital Management Company.

to file a charge of employment discrimination against Respondents. He was unrepresented by counsel at the time and remained unrepresented with respect to his FEPA claim until after November 15, 1979.

At the FEPC Petitioner met with FEPC representative George Crawford, told him of his desire to file a charge, and filled out a form and made handwritten notes detailing the basis for his charge against Respondents. Mr. Crawford kept the form and the handwritten notes, but refused to file the charge at that time. Instead, he advised Petitioner that he had to review the facts of Petitioner's case to determine whether the charge was meritorious before any charge could be filed. Mr. Crawford testified later that he advised Petitioner that, under then existing FEPC rules, the FEPC had 180 days from the Petitioner's last day of work in which to file the charge, if the charge was meritorious, and that the FEPC would, in fact, prepare a formal charge for Petitioner's signature in that event.

Mr. Crawford's representations on July 9, 1979 about Petitioner's right to file his charge resulted in a wrongful refusal to file the charge on that date. The FEPA and the FEPC's official rules and regulations actually provided that Petitioner, himself, had the right to file his charge at any time within 180 days after the occurrence of an alleged unfair employment practice, unconditioned by any prior FEPC investigation to determine the merits of the charge. App., pp. 1a & 2a.[2] Furthermore, the FEPC was required to consider a charge filed when it received from a complainant a written statement sufficiently precise to identify the parties and to describe generally the allegedly wrongful action or practice. App., pp. 1a & 5a.

After the receipt of such a written statement, FEPA and the FEPC's rules and regulations bound the FEPC to serve the charge upon the Respondents within ten days and to initiate an investigation to ascertain the facts relating to the unfair employment practices alleged in the charge. App., pp. 1a & 5a. Upon the completion of the investigation, the FEPC was bound

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[2] Citations to materials in the separate appendix accompanying this petition will be denoted "App" followed by a page cite.

to issue a formal complaint if it found that there was substantial evidence to support the charge and to dismiss the charge if it found a lack of substantial evidence. App., pp. 2a, 5a & 6a.

In refusing to file Petitioner's charge pursuant to the then governing FEPC rules, Mr. Crawford testified that he relied upon an established informal procedure or practice entitled "The Rapid Charge Processing System." App., p. 8a. In direct contravention of FEPA and the FEPC's official rules and regulations, the established informal procedure or practice allowed intake representatives the discretion to refuse to file a charge if the representative entertained any doubt that the complainant's problem was the result of a prohibited practice within the jurisdiction of the FEPC.

In Petitioner's case, Mr. Crawford testified that he elected not to accept the charge for filing until he could make a preliminary determination whether Petitioner's problem was the result of a prohibited practice. Likewise, he failed to serve Petitioner's charge upon Respondents within the prescribed ten days. Instead, he initiated an investigation pursuant to the established informal practice or procedure; made an informal determination that Petitioner's case was meritorious; and filed a formal charge signed by Petitioner on November 15, 1979, a date within 180 days of Petitioner's last day of employment but not within 180 days of the termination letter. On November 16,

1979, he assigned the charge to the FEPC's Springfield office for investigation.[3]

During the interval between the FEPC's wrongful refusal to file Petitioner's charge in July of 1979, and its filing of a formal charge in November of 1979, Petitioner kept in contact with the FEPC. Never during that period did the FEPC permit Petitioner to file his charge himself. On the contrary, each time he spoke to FEPC representatives, the Petitioner was told that no decision had been reached concerning whether his charge would be allowed. Finally, on October 31, 1979, FEPC representatives contacted Petitioner to inform him that the FEPC would permit the charge, and on November 15, 1979, they allowed him to sign the formal charge that they had prepared.

Although the FEPC did not file a charge until November 15, 1979, Respondents had notice of the Petitioner's FEPA proceedings against them well before that time. In early October of 1979 Petitioner retained counsel for a purpose other than representation regarding the FEPA claim, who, on October 4, informed Respondents of the proceeding. Furthermore, FEPC investigators maintained numerous contacts with the Respondents prior to October 31, during the period that they conducted their preliminary investigation.

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[3] On or about July 1, 1980, prior to the termination of the proceedings concerning Petitioner's charge, the FEPC merged into the Illinois Human Rights Commission and the Illinois Human Rights Department, two separate administrative agencies created by the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68 §1-101 et seq., effective July 1, 1980. Pursuant to this Act, the Illinois Human Rights Department handles a complainant's grievance from the initial filing of a charge through the issuance of a formal complaint. The Illinois Human Rights Commission processes complaints through the termination of the litigation in any particular case. The Illinois Supreme Court has determined that the Illinois Human Rights Act does not have retroactive application. *See Zimmerman Brush Co. v. Fair Employment Practices Commission*, 82 Ill. 2d 99, 108-109, 411 N.E. 2d 277, 282 - 283 (1980) Accordingly, the FEPA and the rules and regulations of the FEPC in effect at the time that Petitioner attempted to file his charge governed the handling of his charge. For the sake of clarity, the entity handling Petitioner's charge following July 1, 1980 will be referred to throughout this Petition as the FEPC.

Following November 15, 1979, the FEPC undertook a formal investigation pursuant to FEPA and the FEPC's official rules and regulations to determine whether there was substantial evidence to support Petitioner's charge. This formal investigation ultimately resulted in the FEPC's finding of substantial evidence to support the charge on February 6, 1981.

Shortly thereafter, on April 3, 1981, the FEPC prepared a formal written complaint pursuant to the FEPA and the FEPC's official rules and regulations and served the same on Respondents.

Respondents moved to dismiss the Complaint in June of 1981 on the ground, *inter alia,* that Petitioner's charge had not been filed within 180 days of the date that the alleged unfair employment practice had been committed. Specifically, Respondents maintained that the 180 days should have been computed from the date Petitioner was notified of his termination rather than from the last day of his employment. Since the FEPC did not file Petitioner's charge until November 15, 1979, while notice of termination was given on April 30, 1979, Respondents argued that Petitioner's charge was untimely.

In its order of June 18, 1981, the FEPC rejected Respondents' argument, affirming its rule, announced in *Rothbardt and Northeastern Illinois University,* 4 Ill. F.E.P. Rep. 8 (F.E.P.C. January 12, 1977), that the filing of a charge begins to run from the date termination of employment takes effect, rather than from the time notice of termination is given. App., p. 14a. At that time, the agency's interpretation of the 180 day time filing requirement was the only interpretation that existed.

Thereafter, Petitioner's claim proceeded to a preliminary hearing on the merits on September 16 and 17, 1981, October 19, 20 and 21, 1981, and December 17 and 18, 1981. On September 9, 1982, the administrative law judge entered a Recommended Order and Decision in favor of Petitioner.

B. The FEPC's Review of the Recommended Order and Decision.

The administrative law judge's Recommended Order and Decision did not constitute a final determination on the merits.

The FEPA and the FEPC's official rules and regulations required the FEPC to review each recommended order, together with the record of proceedings, prior to the issuance of a final order and decision in any matter. App., p. 7a. Only the FEPC's decision was final.

On October 27, 1982, in connection with the review proceedings, Respondents filed exceptions to the administrative law judge's Recommended Order and Decision, raising among other issues the effect of an Illinois appellate court decision, *Board of Governors v. Rothbardt,* 98 Ill. App.3d 423, 424 N.E.2d 842 (4th Dist. 1981), on the disposition of the case. In that decision, announced on July 17, 1981, the appellate court for the fourth district announced that a timely charge was one which was filed within 180 days of notice of the act of discrimination, regardless of the date of actual termination.

The appellate court acknowledged that in so ruling, it was ruling upon a question of first impression in Illinois. Because the time filing requirement was deemed to be jurisdictional, Respondents urged the FEPC that the *Rothbardt* decision deprived it of further jurisdiction to entertain Petitioner's action and required the FEPC to dismiss the case.

In its order dated January 7, 1983, the FEPC held that the *Rothbardt* decision was not determinative concerning whether the FEPC lacked jurisdiction to entertain the Petitioner's action because of the recent first district appellate court decision in *Lott v. Governors State University,* 106 Ill. App.3d 851, 436 N.E.2d 569 (1st Dist. 1982).

In *Lott,* the first district had held that the Illinois Human Rights Commission's administrative delay in filing a complaint on a petitioner's behalf, resulting in the lapsing of the 180 day jurisdictional time period for filing the same, could not deprive him of his cause of action. Relying on this Court's decision in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), which also involved the lapsing of a mandatory jurisdictional time period because of administrative delay, the court in *Lott* had held that such a result would deprive a complainant of equal protection and due process of the law.

It is unquestionable that Petitioner's charge would have been timely filed if the FEPC had not improperly refused to allow Petitioner to file his charge in July of 1979 when he attempted to persuade the agency to accept it for filing. Accordingly, the FEPC remanded the Petitioner's case to the administrative law judge to hear additional evidence on the facts and circumstances surrounding the filing of Petitioner's charge.

C. The FEPC's Proceedings in Connection With the Administrative Law Judge's Supplemental Order and Decision.

On remand, the Petitioner argued, *inter alia,* that the new interpretation of the 180 day charge filing requirement set forth in *Rothbardt* should not be applied in his case because of the due process principles announced in *Logan.* Petitioner argued specifically that *Logan* forbade the abrogation of a complainant's cause of action because of a state agency's failure to process the same in accordance with a jurisdictional time limit, rather than the fault of the Complaint and that the retroactive application of *Rothbardt* had the effect of violating Petitioner's right to due process.

On November 12, 1985, after hearing the evidence on remand and considering the briefing by the parties, the administrative law judge issued a Supplemental Recommended Order and Decision in which he found that the *Rothbardt* interpretation of the 180 day time filing requirement applied retroactively to Petitioner's case. However, he further found that the agency's action preventing the timely filing of Petitioner's charge compelled the FEPC to permit the Petitioner's case to proceed to a final determination on the merits because of the due process considerations set forth in *Logan.*

On review of the Supplemental Recommended Order and Decision, the FEPC attacked the administrative law judge's position that agency conduct led to the failure to file a timely charge. The FEPC acknowledged that the failure to file a charge on a timely basis had been due to a practice of the FEPC. Nonetheless, the FEPC concluded, without analysis, that the Petitioner had no right to rely on the FEPC'S interpretation of a timely charge and that, the agency's practice of taking control

over the charge filing process could not, therefore, have deprived the Petitioner of his due process rights. Rather, the FEPC held that Petitioner's case came within footnote seven of the *Logan* decision which excepts from its ruling cases wherein the claimant fails to comply with a reasonable procedural requirement or fails to file a timely charge. Accordingly, the FEPC held that *Rothbardt* deprived the FEPC of jurisdiction to proceed with Petitioner's action. App., p. 29a, 35a.

D. Disposition of Petitioner's Complaint for Administrative Review in the Appellate Court.

Petitioner subsequently filed his Complaint for Administrative Review in the appellate court for the fourth district of Illinois, alleging, *inter alia,* that the FEPC had erred in construing *Logan* to be inapplicable to cases in which a state agency practice prevents a complainant from filing a timely charge.

Petitioner and Respondents fully briefed these issues before the appellate court for the fourth district; and, on March 1, 1988, the appellate court issued an order affirming the FEPC's dismissal of Petitioner's action. In essence, the appellate court held that since the 180 day jurisdictional time filing requirement was a component of the right created and the 180 days ran from the time Petitioner received his termination letter, Petitioner had no cause of action. App., p. 15a, 21a. The appellate court distinguished *Logan* merely on the basis that *Logan* did not involve a claim that was untimely filed.

Subsequent to the appellate court's ruling, Petitioner filed a Petition for Rehearing. The appellate court for the fourth district denied that petition on March 25, 1988. App., p. 25a.

E. Disposition of Petitioner's Request for Leave to Appeal to the Illinois Supreme Court.

Petitioner then prayed for leave to appeal to the Illinois Supreme Court on the ground, *inter alia,* that the appellate court had misconstrued *Logan* as being inapplicable to Petitioner's case. On October 6, 1988, the Illinois Supreme Court denied the Petitioner Leave to Appeal. App., p. 26a.

REASONS FOR GRANTING THE PETITION

I. THE FEPC'S ACTIVE INTERFERENCE WITH THE PETITIONER'S PURSUIT OF HIS ADMINISTRATIVE CLAIM, RESULTING IN THE DISMISSAL OF HIS CLAIM, DEPRIVED PETITIONER OF DUE PROCESS OF THE LAW.

This Court should accept certiorari in this case because the decision of the Illinois appellate court, affirming the dismissal of Petitioner's action, directly conflicts with the due process principles announced by the Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 420 (1982).

In *Logan* the FEPC terminated Logan's cause of action under the FEPA because an agent of the FEPC failed to process Logan's claim within the framework prescribed by a statutorily mandated jurisdictional time limit. A majority of this Court determined that the termination deprived Mr. Logan of a constitutionally protected property interest, the right to use the FEPA's adjudicatory procedures to prosecute his FEPA claim, without due process of law. Noting that under the FEPA's statutory scheme, a claim could not be terminated except for cause, the Court determined that due process required both access to the FEPA's adjudicatory procedures and a hearing on the merits of Petitioner's claim before any decision dismissing the claim could be made.

The circumstances of this case are virtually identical to those involved in *Logan*. Agency practice permitted Petitioner's cause of action to lapse through no fault of his own. Therefore, *Logan* compels the determination that the state's termination of Petitioner's cause of action without a final adjudication on the merits deprived the Petitioner of due process.

There are thousands of cases just like Petitioner's in which claimants were subjected to the FEPC's unlawful "Rapid Charge Processing System" only to learn that their claims had been lost because the FEPC failed to act within the jurisdictional limit. When Petitioner's case was on appeal to the Illinois Supreme Court, an amicus brief was filed in favor of Petitioner's petition for leave to appeal to that court by the Mandel Legal Aid Clinic

of the University of Chicago. In its amicus brief it stated to the court that "approximately five thousand other complainants are directly, adversely affected by the Fourth District's decision below." App., 27a.

This Court should not permit the state courts to put their imprimaturs of approval on unconstitutional acts and should accept certiorari in this case to correct that result.

A. Petitioner had a Constitutionally Protected Property Interest in Pursuing his Employment Discrimination Claim Via the FEPC's Adjudicatory Procedures.

This Court has traditionally looked to state law to determine whether an interest is "property" within the meaning of the Due Process Clause. *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1 (1978). *See, also, Board of Regents v. Roth,* 408 U.S. 564 (1972) and *Perry v. Sindermann,* 408 U.S. 593 (1972).

Where an interest has been granted to an individual by the state and "cause" is a requirement for its abrogation, then the interest constitutes constitutionally protected property. *Memphis Light; Goss v. Lopez,* 419 U.S. 565 (1975); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

Article 1, §19 of the Illinois Constitution entitles all persons with a physical or mental handicap unrelated to ability to the right to be free from discrimination in the hiring and promotion practices of any employer. This state-created right is the foundation for Petitioner's claim of employment discrimination.

During the period that it was in effect, FEPA was the legislatively mandated means of vindicating this Constitutional right, in fact, the exclusive means for doing so. Furthermore, it established a comprehensive scheme for adjudicating claims of discrimination which ensured that a claim could not be terminated except for cause. In particular, the FEPA required the FEPC to determine by investigation whether there was substantial evidence supporting an individual's charge. Then, after an evidentiary hearing, the FEPC decided whether an unfair employment practice had occurred. A charge could be dismissed only if it was found to be unmeritorious or if either party defaulted.

App., p. 5a. Because Petitioner's interest in pursuing his FEPA claim has been granted to him by the state and cannot be removed except for cause, it constitutes property protected by the Fourteenth Amendment.

The importance of the interests protected by FEPA are undeniably worthy of Constitutional protection. The Illinois legislature recognized that employment discrimination wastes "the productive capacities of individuals . . . [and] deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living." Victims of discrimination may be found to "resort to public charity and the anger bred by discriminatory treatment may cause conflicts and controversies resulting in grave injury to the public safety, health and welfare." Ill. Rev. Stat. ch 48, §851 (1979).

Recently, this Court has confirmed that the right to use the FEPA's adjudicatory procedures is a protected property interest. In *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 431 (1982), the majority stated unambiguously,

> The right to use the FEPA's adjudicatory procedures shares these characteristics [the characteristics of property]. A claimant has more than an abstract desire or interest in redressing his grievance; his right to redress is guaranteed by the state, with the adequacy of his claim assessed under what is, in essence a "for cause" standard, based upon the substantiality of the evidence. And an FEPA claim, which presumably can be surrendered for value is at least as substantial as the right to an education labeled as property in *Goss v. Lopez,* supra. Certainly it would require a remarkable reading of a "broad and majestic term" to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment, while a state-created right to redress discrimination is not.

Accordingly, because Petitioner has an entitlement to be free from discrimination guaranteed by the Illinois constitution, because FEPA ensures a means of vindicating that right which cannot be abrogated except for cause, and because the interests underlying Petitioner's entitlement are important societal

interests, Petitioner has a protected property interest in pursuing his employment discrimination claim through use of the FEPA's adjudicatory procedures, under the governing precedents of this Court, which cannot be denied him without due process of law.

B. The Dismissal of Petitioner's Action Through No Fault of His Own Violated Due Process Because it Deprived the Petitioner of a "For Cause" Determination on the Merits of His Claim.

The dismissal of Petitioner's employment discrimination through no fault of his own, but, rather, through the misapplication of an unlawful agency practice to Petitioner's case violated the Petitioner's due process rights because it deprived the Petitioner of a "for cause" determination on the merits of his claim. Although the administrative law judge made a determination on the merits in Petitioner's favor, that determination was not final until the FEPC itself reviewed the merits. The FEPC declined to conduct this review before dismissing Petitioner's action, thereby depriving him of a "for cause" determination. The decision of the Illinois appellate court for the fourth district ratified this unconstitutional result by affirming the dismissal of Petitioner's action through the retroactive application of *Rothbardt*.

The minimum guarantee of due process protection is the opportunity to be heard before being deprived of a protected interest in property or liberty. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 371 (1971); and *Goldberg v. Kelly*, 397 U.S. 254 (1970). Inherent in this idea is the concept that a protected property interest cannot be abrogated except for cause. Thus a decision based on the merits or on the conduct of one of the parties is a traditional minimum requirement of due process. *Bell v. Burson*, 402 U.S. 535 (1971). Assuredly, the exact timing of the required hearing may vary as well as the degree of formality, but in all cases a "for cause" determination on the merits is necessary before a person can be deprived of a protected property interest within the bounds of due process.

The need for a decision on the merits is especially acute when the deprivation of an interest is permanent. For example,

in *Barry v. Barchi*, 443 U.S. 55 (1979), the Court found that the post-suspension hearing provided by the statute violated due process because it was not held soon enough after the suspension to avoid a *de facto* final deprivation.

In this case, Petitioner, like the Petitioners in each of the cited authorities, was entitled to a final determination on the merits of his claim before his cause of action could be dismissed consistent with due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Although a post-deprivation hearing, such as a suit for damages against state officials, may be sufficient to protect a claimant's due process rights in cases where a deprivation of property occurs as a result of the unauthorized random failure of a state agent to follow established state procedures, *Logan* and subsequent decisions clearly demonstrate that such a hearing would be insufficient in this case.

In *Logan*, this Court held that Logan's employment discrimination action could not be terminated because of agency inadvertence in processing his claim within a 120 day statutorily mandated jurisdictional time period for agency action on his claim. Rather, *Logan* was entitled to a hearing on the merits of his FEPA claim before it could be eliminated. In so holding, the Court noted that its decisions had time and again emphasized that the Due Process Clause grants aggrieved parties the opportunity to present their cases and have the merits fairly judged, making some kind of hearing prior to deprivation an absolute necessity.

This Court acknowledged in *Logan* that the timing and nature of the required hearing would depend upon the appropriate accommodation of the competing interests involved, including the importance of the private interest, the length or finality of the deprivation, and the likelihood of government error.

Applying those principles, the Court observed that Logan's interests in retaining his employment, in disproving his employer's charges of incompetence or inability and in redressing an instance of discrimination were all substantial. Further, the deprivation was final because *Logan*, unlike a claimant whose charge is dismissed on the merits for lack of evidence, could not obtain judicial review of FEPC action. The Court held that a

system or procedure that deprives persons of their claims in a random manner presents an unjustifiably high risk that meritorious claims will be terminated. Furthermore the state's interest in refusing Logan's request to proceed with his claim was insubstantial. The Court concluded that Logan was, therefore, entitled to have the FEPC consider the merits of his charge based upon the substantiality of the available evidence, before deciding whether to terminate his claim.

The Court expressly distinguished *Paratt v. Taylor,* 451 U.S. 527 (1981) in reaching this result. In *Paratt,* a state employee had negligently lost a prisoner's hobby kit. The Court had concluded, in that case, that the prisoner had suffered a deprivation of property within the meaning of the Fourteenth Amendment but that all the process that was due him was provided by the state's tort claims procedure.

In distinguishing *Paratt,* the Court observed that negligent deprivations such as those in *Paratt* were difficult to prevent via a predeprivation hearing precisely because they involved random unauthorized acts of state employees rather than acts taken pursuant to some established state procedure.

In the *Logan* case, on the other hand, the state system itself destroyed the complainant's property interest by operation of law, whenever the FEPC failed to convene a timely fact-finding conference — whether the FEPC's action was taken through negligence, maliciousness or otherwise. Unlike the complainant in *Paratt,* Logan was challenging not the FEPC's error but an established state procedure that destroyed his entitlement without according him proper procedural safeguards.

The Court further observed that a post-deprivation hearing would be constitutionally inadequate, in any event. It would leave *Logan* only with a tort suit against the state which could not make him whole regarding such things as reinstatement and backpay. Accordingly, *Paratt* did not apply to render a predeprivation hearing on the merits unnecessary.

This case is exactly like *Logan* in all material respects. As in *Logan,* an established state procedure rather than a random unauthorized act of a state employee destroyed the complainant's

property interest. That established procedure was an informal written procedure for processing charges that allowed intake representatives the discretion not to file a charge if they believed the complainant's problem not to be the result of a prohibited practice. The procedure left sole control over whether a charge was filed within the jurisdictional 180 day time limit in the hands of the intake representative, just as surely as the FEPC's official procedure in *Logan* left in the sole control of the FEPC whether the 120 day jurisdictional hearing requirement would be met. Thus, the FEPC's informal procedure wrongfully permitted situations in which the FEPC's failure to file a charge within 180 days could terminate a complainant's cause of action.

The very same policy determinations considered in *Logan* to justify a predeprivation hearing on the merits apply with equal force to this case. Petitioner has substantial interests in retaining his employment and in disproving his employer's charges of incompetence or inability. Furthermore, he has an even stronger interest than in *Logan* in redressing an instance of alleged discrimination because the administrative law judge has actually issued a Recommended Order and Decision to the effect that Petitioner was discriminated against. Furthermore, like the deprivation in *Logan*, the deprivation here is final. Unlike a claimant whose charge is dismissed on the merits, Petitioner cannot even obtain judicial review going to the substance of his claim.

A post deprivation hearing would be just as useless in this case as it was in *Logan*. At most, Petitioner could attempt to sue the FEPC in state court on a tort theory. Such a proceeding would be both lengthy and speculative. Furthermore, Petitioner could get neither reinstatement nor backpay. Accordingly, like the complainant in *Logan*, Petitioner was entitled to a final adjudication on the merits of his claim before his cause of action could be terminated.

Respondents have argued below that *Logan* is inapplicable because *Logan* did not involve a charge that was untimely filed. In support of their position that this distinction makes a difference, Respondents have relied heavily upon the portion of the Court's opinion stating that a State may erect reasonable procedural requirements for triggering the right to an adjudi-

cation by means of statutes of limitations and that the States accord due process when they terminate a claim for failure to comply with a reasonable procedural rule. Respondents' reliance on this portion of the Court's opinion is misplaced. Nowhere did the Court say that a State may erect reasonable procedural rules for triggering the right to an adjudication, systematically prevent a claimant from utilizing those rules via a contrary procedure, and then terminate the claimant's cause of action because he did not follow the reasonable procedural rule in spite of the systematic prevention. Any other conclusion makes a mockery of this Court's opinion.

Respondents have also relied heavily on footnote seven of the *Logan* opinion which states that the Court did not mean to suggest that the state must consider the merits of a claim when the claimant fails to fails to file a timely charge. Respondents' reliance on this footnote is also wholly misplaced. In the very text of the footnote, this Court italicized the word "claimant", emphasizing that its opinion is inapplicable only where the noncompliance or untimeliness is the result of the claimant's fault rather than the agency's.

Thus, *Logan* is applicable to all situations in which agency conduct, whether intentional or inadvertent, leads to the lapsing of a jurisdictional time filing requirement and jeopardizes the claimant's right further to pursue his claim. Any other conclusion "would allow the State to destroy virtually any state-created property interest."

Logan renders it abundantly clear that the FEPC's inaction in this case unconstitutionally deprived Petitioner of his protected property interest in pursuing his claim and that Petitioner is entitled to a hearing on the merits of his claim.

II. THE FEPC AND THE ILLINOIS COURTS ERRONEOUSLY APPLIED THE *ROTHBARDT* DECISION RETROACTIVELY TO PETITIONER'S CASE TO PERMIT AN UNCONSTITUTIONAL AND INEQUITABLE RESULT.

Retroactive application of the *Rothbardt* decision by the FEPC and the Illinois appellate court for the fourth district

ratified and completed the abrogation of the Petitioner's due process rights. Furthermore, it endangered the claims of a whole class of persons who brought their claims to the attention of the FEPC well within the statutorily mandated time period but suffered the FEPC's unlawful "Rapid Charge Processing System" procedure. This procedure left the determination to act within the statutory time limit entirely within the control of the FEPC, creating a system whereby mere agency inadvertance and not the conduct of a complainant could abrogate a complainant's claim. In *Logan,* the Court decried agency schemes which produce results such as those indicated. This Court should accept certiorari to reverse the retroactive application of *Rothbardt* and thus avert the injustice that the Illinois appellate court has sanctioned and that *Logan* was designed to avoid.

Acceptance of certiarori under the circumstances of this case is particularly appropriate because this Court has expressly recognized that the nonretroactive application of a judicial decision is required in such circumstances.

In *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971) the issue before the Court was whether a United States Supreme Court opinion applying a one-year statute of limitations to actions for personal injuries on offshore oil dwelling rigs should be retroactively applied to bar actions that had been commenced and prosecuted in the reasonable belief, based on federal decisions, that the one-year statute did not apply and that were pending at the time the contrary opinion was announced. The Court held that the decision should not be retroactively applied to such cases.

In so holding, the Court noted that the respondent was not at fault in any way in failing to comply with the one year statute because the decision in question had both decided an issue of first impression and effectively overruled a long line of decisions. For the two years prior to the filing of his lawsuit and for an entire year of his pretrial proceedings, the overruled decisions represented the law governing respondent's case. It could not, therefore, be assumed that respondent did or could foresee that those decisions would be overruled. The Court cautioned against indulging in the fiction that the law now announced has always

been the law and that those who have not availed themselves of it have waived their rights.

The Court further held that to hold respondent's lawsuit retroactively time barred would be anomalous since the primary purpose underlying the statutory scheme pursuant to which respondent had sued was to aid injured employees and afford them comprehensive remedies. The Court emphasized that, contrary to the purpose of the statutory scheme, retroactive application of the new Court decision would deprive the respondent of any remedy, whatsoever. Accordingly, terminating the lawsuit after it had proceeded through lengthy and, no doubt, costly discovery served no beneficial purpose.

The Court then again stressed that retroactive application would produce the most "substantial inequitable results" in that it would result in the abrogation of respondent's right to his day in court at a time when he could not have known the limitations that the law imposed upon him. Having made these findings, the Court concluded that retroactive application of the new decision was in order and affirmed the circuit court's opinion to that effect.

The case at hand bears remarkable similarity to the *Chevron Oil* case because the Petitioner was not at all at fault in failing to comply with the jurisdictional time limit as it was interpreted in *Rothbardt*. First, in *Rothbardt*, the Court decided a question of first impression, namely from what event the 180 day period for filing a charge was to run. Second, always prior to *Rothbardt*, the agency rule had been that the period for filing a charge ran from the date of the employee's actual termination, rather than his notice of termination. This rule was announced by the agency as early as 1977; furthermore, FEPC representatives informed Petitioner of the agency interpretation and applied it to his case. Third, numerous judicial decisions in Illinois acknowledge the reasonableness of relying on agency interpretations of the

law. [4] Accordingly, Petitioner, like the respondent in *Chevron,* reasonably relied on existing law in assuming that his charge was governed by the rule that filing had to occur within 180 days from the last day of his employment. Like the respondent's action in *Chevron Oil,* Petitioner's action proceeded for at least a year before the new interpretation of the statutory time period was announced, and there was nothing to foreshadow a change in the rule.

Retroactive application of *Rothbardt* would no more effectively further the purpose and effect of the statutory scheme, in this case, than retroactive application of the opinion considered in *Chevron Oil* would have furthered the statutory scheme at issue there. Similarly to the statutory scheme in *Chevron Oil,* the purpose of the statutory scheme under which Petitioner sued was to aid injured individuals by affording them comprehensive remedies. The whole statutory scheme is frustrated by *Rothbardt's* retroactive application to Petitioner's case because retroactive application would deprive Petitioner of any remedy, whatsoever, on the basis of an unforeseeable change in the law. Thus, just as it would have been anomalous to apply the decision considered in *Chevron* retroactively, it would be anomalous to apply *Rothbardt* retroactively in this case.

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[4] *See e.g., Illinois Consolidated Telephone Co. v. The Illinois Commerce Commission,* 95 Ill. 2d 142, 447 N.E.2d 295 (1983) (it is generally recognized that courts will give substantial weight and deference to an interpretation of a statute by the agency charged with the enforcement of the statute); *Adams v. Jewel Companies, Inc.,* 63 Ill. 2d 336, 348 N.E.2d 161 (1976) (interpretation by administrative agencies provides an informed source for ascertaining legislative intent; and *Johnson v. Marshall Field & Co.,* 57 Ill. 2d 272, 312 N.E.2d 271 (the interpretation of statutes by administrative bodies constitutes an informed source for guidance to ascertain the legislature's intention when it enacted the statute).

CONCLUSION

This Court should accept certiorari to correct the unconstitutional abrogation of Petitioner's rights which the Illinois appellate court and the Illinois Supreme Court have sanctioned and to avoid the same result in thousands of other cases similar to Petitioner's. This Court's decision in *Logan* forbids such deprivations. In the alternative, in view of the clear mandate of the *Logan* case, Petitioner prays for summary reversal of the appellate court's decision.

DATED: January 3, 1989

Respectfully submitted,

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APPENDIX

FAIR EMPLOYMENT PRACTICES ACT

Section 8. Procedure - charge, investigation, conference, settlement and adjustment -

Whenever within 180 days after the date that an unfair employment practice allegedly has been committed, a charge in writing under oath or affirmation is filed with the Commission by a complainant or by the Commission upon a vote of at least three members and in such detail as to substantially apprise any party properly concerned as to the time, place and facts with respect to such alleged unfair employment practice, that any employer, labor organization, employment agency, or person, hereinafter referred to as a respondent, has committed such unfair employment practice, the Commission shall promptly serve a copy of the charge within 10 days on the respondent and thereafter shall institute an investigation by its employees to ascertain the facts relating to such alleged unfair employment practice. If it is determined by the Commission, after such investigation, that there is not substantial evidence that the alleged unfair employment practice has been committed, the charge shall be dismissed; otherwise the Commission, a Commissioner or a hearing officer, who shall be an attorney licensed to practice in Illinois, designated by the Commission, shall endeavor to eliminate the effect thereof and prevent repetition thereof by means of conference and conciliation. The complainant and respondent shall be notified of the time and place of the conference by registered or certified mail at least 10 days prior thereto and either or both parties shall appear at such conference or conciliation in person or by attorney. The place fixed shall be within 35 miles of the place where the unfair practice is alleged to have been committed. What occurs in the conference or conciliation meeting shall not be disclosed by the Commission unless the complainant and respondent agree in writing that such disclosure be made. When a settlement is effectuated in conference and conciliation conducted by a Commissioner or hearing officer, the terms of settlement and adjustment shall be subject to the approval of the Commission. The Commission shall notify the complainant and the respondent of the disposition of every charge filed and the terms of any settlement, adjustment or dismissal thereof. Any member of the Commission who takes

part in an investigation shall thereby be disqualified to hear any evidence on the cause in question. Except as provided in this Section, the manner and form of filing charges shall be in accordance with such rules and regulations as the Commission shall from time to time prescribe. If a settlement is effectuated, and the terms thereof are approved by the Commission, then the Commission shall prepare written terms of settlement and adjustment and have the complainant and respondent agree to them in writing. The Commission shall then enter upon all parties an order in accord with the executed written terms of settlement and adjustment. If the Commission determines after an investigation that there is substantial evidence that the respondent has violated the terms of settlement and adjustment and the order entered pursuant thereto, the Commission may either commence an action pursuant to Section 11 of the Act, or issue a written complaint and order a public hearing on such alleged violation, and, finding that such alleged violation has occurred, may then order such remedies as may be necessary to correct the violation. If the Commission finds that no violation has occurred it shall dismiss the complaint. If terms of settlement and adjustment not approved by the Commission are entered into by a complainant and respondent, the Commission need not enter an order in accord therewith and may terminate further proceedings in the case. The Commission may dismiss a charge if, in conference and conciliation, it is established to the satisfaction of the Commission that the respondent has taken steps to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof, or if, in conference and conciliation, the respondent offers and the complainant declines to accept terms of settlement and adjustment which the Commission finds are sufficient to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof.

Section 8.01. Procedure - complaint, answer, hearing and order—

(a) In case of failure to settle or adjust any such charge by conference and conciliation in accordance with Section 8 of this Act, the Commission shall cause to be issued and served upon such respondent a written

complaint, under oath or affirmation, stating the charge of unfair employment practice substantially as alleged in the charge theretofore filed with the Commission as hereinbefore provided in Section 8 of this Act and the relief sought on behalf of the person aggrieved and containing a notice of public hearing before a Commissioner or a duly appointed hearing examiner at a place therein fixed, to be held not less than 30 nor more than 90 days after the service of such complaint. The place fixed shall be within 100 miles of the place where the unfair employment practice is alleged to have been committed.

Whenever such a charge of an unfair employment practice has been properly filed, the Commission, within 180 days thereof or within any extension of the 180 day period agreed to in writing by all parties and approved by a member of the Commission, shall either issue and serve a complaint in the manner and form set forth in this Section or shall order that no complaint be issued. Any such order shall be duly served upon both the complainant and the respondent.

Section 8.02. Procedure - review by Commission, order -

(a) The findings and recommended order of the Commissioner or hearing examiner shall be filed with the Commission.

(d) Following the filing of the findings and recommended order of the hearing examiner and any written exceptions and responses thereto, and any other proceedings provided for in this Section, the Commission shall review the record and may adopt, modify or reverse in whole or in part the findings and recommendations of the hearing examiner. The Commission shall adopt the hearing examiner's findings of fact if they are not contrary to the manifest weight of the evidence. The Commission shall file its written order and decision in its office and serve copies thereof on all parties together with a notification of the date when it was

RULES AND REGULATIONS OF THE FAIR EMPLOYMENT PRACTICES COMMISSION

PART TWO: CHARGES OF UNFAIR EMPLOYMENT PRACTICE
ARTICLE III
Charge

Section 3.1. Time of Filing - A complainant, or the Commission upon a vote of at least three members, may file a charge at any time within 180 days after occurrence of an alleged unfair employment practice. If the alleged unfair employment practice is of a continuing nature, the date of occurrence may be any date subsequent to the commencement of the unfair employment practice up to and including the date on which it shall have ceased.

Section 3.2. Form - A charge shall be in writing and signed by the complainant, or by a member of the Commission in the case of a Commission charge, under oath or affirmation before a notary public or other person authorized by law to administer oaths or affirmations. Notary service shall be provided without cost at the Commission's offices.

Section 3.3. Contents - A charge shall be in such detail as to substantially apprise any party of the time, place and facts with respect to the alleged unfair employment practice. It should contain the following:

(a) The full name and address of the complainant, or a statement that the charge is filed in the name of the Commission in the case of a Commission charge;

(b) The full name and address of the respondent;

(c) A statement of the facts alleged to constitute the unfair employment practice, including the date, time, and place thereof;

(d) A statement describing any other action instituted by or on behalf of the complainant in any other forum, including one instituted under grievance or arbitration provisions of a collective bargaining agreement, based on any of the incidents or practices alleged in the charge.

Section 3.4. Amendment -

(a) Notwithstanding any other provisions of these Rules and Regulations, a charge shall be deemed filed when the Commission receives from a complainant a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge or any part thereof may subsequently be amended by the complainant to cure technical defects or omissions (including failure to properly subscribe or swear to the charge as hereinabove provided), or to clarify or amplify allegations made therein, or to set forth additional facts or allegations related to the subject matter of the original charge, and such amendments shall relate back to the original filing date.

ARTICLE IV
Investigation

Section 4.1. Docketing and Service of Charge - Each charge, once filed, shall be docketed and assigned a case number by the Commission, and a copy of such charge shall, within ten (10) days following the date of filing, be served by the Commission on the named respondent.

Section 4.3. Investigation - After a charge has been filed, the Commission's staff shall institute an investigation to ascertain the facts relating to the unfair employment practice alleged in the charge and any amendments thereto.

Section 4.5. Dismissal After Investigation - If after investigation of a charge, the investigative findings indicate that the charge is not supported by substantial evidence or that the Commission lacks jurisdiction of the charge or that the charge otherwise should be dismissed, and this indication is concurred in by the Commission's Director of Investigations, the Director of Investigations shall thereupon cause to be served upon the complainant a Notice of Dismissal. The Notice of Dismissal shall advise the complainant that the charge is recommended for

dismissal, and shall state the ground upon which it is to be dismissed, and shall be accompanied by a copy of the written investigation report. The Notice shall further advise that the complainant may object to dismissal of the charge and obtain consideration of the matter by the full Commission, by serving a demand therefor upon the Commission within thirty (30) days of the date of the Notice. If no such timely demand is served by the complainant upon the Commission, the charge shall be deemed dismissed as of the expiration of said thirty-day period, and the parties shall be so notified. In the event the complainant files a timely demand for reconsideration as herein provided, the matter shall be submitted to the full Commission for determination. A complainant's timely demand for reconsideration under this Section may be accompanied by such statements and/or evidence as the complainant may feel supports the charge.

Section 4.6. Commission Finding - After investigation, the Director of Investigations shall submit to the Commission each charge which the investigation indicates is supported by substantial evidence, or in which a complainant has filed a timely demand for reconsideration of a Notice of Dismissal as provided in Section 4.5 of these Rules and Regulations. If the Commission finds that it has jurisdiction of the charge and that there is substantial evidence to support the charge, it shall order that conciliation be attempted in accordance with Article V of these Rules and Regulations. Otherwise, it may return the charge for further investigation, or order that the charge be dismissed. In the event that a charge is ordered to conciliation or ordered dismissed, the Commission shall promptly serve notice of such action upon all parties.

ARTICLE X

Section 10.1. Service of Complaint - A complaint and notice of public hearing, issued by the Commission pursuant to Article V, Section 5.7 of these Rules and Regulations, or pursuant to Article VIII, Section 8.4(b) of these Rules and Regulations, shall be served by the Commission upon the parties to such proceeding either personally or by registered or certified mail.

Section 10.2. Form of Complaint - The complaint shall be in writing and shall state the relief sought. The allegations

of the complaint may encompass (a) such matters as alleged in the underlying charge or which are substantially related thereto, and (b) such matters as would constitute noncompliance with Part Three of these Rules and Regulations and which were involved in the Commission's investigation or compliance review.

ARTICLE XII

Review of Recommended Order and Decision

Section 12.1. Recommended Order Not Final - The Administrative Law Judge's recommended order and decision shall not constitute a final order determining or disposing of the proceedings. Whether or not exceptions to the recommended order and decision are filed with the Commission as hereinafter provided, the Commission shall review each recommended order together with the record of proceedings prior to issuance of its final order and decision therein. Only the Commission's decision shall be final.

ARTICLE XIV

Section 14.2 Standard of Review - The Commission shall accept the findings of fact of its Administrative Law Judge and of the person who presided at any supplemental proceedings as true and correct, unless it shall find that such findings or any of them are contrary to the manifest weight of the evidence.

ILLINOIS REGISTER

AGENCY: Fair Employment Practices Commission

ACTION: Emergency Adoption of Amendments to Rules and Regulations.

STATUTORY AUTHORITY: Ill. Rev. Stat., ch. 48, §856.05.

EXPLANATION: In response to a growing backlog of charges filed with it, the Fair Employment Practices Commission is revamping its intake and investigative techniques so as to enable it more readily to identify charges which do not state a claim under the FEPA, and to more rapidly resolve charges through investigation and settlement. Because of the magnitude of the present backlog and the volume of new charges it receives daily, the Commission must implement these new techniques on an emergency basis, beginning as of Monday, March 13, 1978.

DESCRIPTION: Under these new procedures, the Commission will conduct more intensive interviews of prospective complainants, administratively close charges in which complainants fail to cooperate, and schedule early fact-finding conferences to obtain evidence and provide an opportunity for rapid settlement of disputes. The new procedures will be implemented through amendments to Articles III and IV of the Commission's Rules and Regulations adopted by the Commission on March 8, 1978.

THE FULL TEXT OF THE AMENDED ARTICLES III AND IV FOLLOWS:

ARTICLE III
Charge

Section 3.1. Time of Filing–A complainant, or the Commission upon a vote of at least three members, may file a charge at any time within 180 days after occurrence of an alleged unfair employment practice. If the alleged unfair employment practice is of a continuing nature, the date of occurrence may be any date subsequent to the commencement of the unfair employment practice up to and including the date on which it shall have ceased.

Section 3.2. Form–A charge shall be in writing and signed by the complainant, or by a member of the Commission in the case of a Commission charge, under oath or affirmation before a notary public or other person authorized by law to administer oaths or affirmations. Notary service shall be provided without cost at the Commission's offices.

Section 3.3. Contents–A charge shall be in such detail as to substantially apprise any party of the time, place and facts with respect to the alleged unfair employment practice. It should contain the following:

(a) The full name and address of the complainant, or a statement that the charge is filed in the name of the Commission in the case of a Commission charge;

(b) The full name and address of the respondent;

(c) A statement of the facts alleged to constitute the unfair employment practice, including the date, time, and place thereof;

(d) A statement describing any other action instituted by or on behalf of the complainant in any other forum, including one instituted under grievance or arbitration provisions of a collective bargaining agreement, based on any of the incidents or practices alleged in the charge.

Section 3.4. Requirements for Charge–In addition to the elements specified in Section 3.3 hereof, an individual may be required to provide the Commission with the following information where available to enable the Commission to determine whether the facts alleged by the individual state a claim of unfair employment practice under the Act:

(a) The approximate number of persons employed by any entity which is sought to be charged in the capacity of an employer;

(b) For each alleged unfair employment practice,

a statement of the facts which lead the individual to believe that the practice is or was unlawful;

(c) A statement of each specific harm or injury that the individual has suffered as a consequence of the alleged unfair employment practice.

Section 3.5. Acceptance of Charge–

(a) The Commission shall accept for filing any charge which it receives from an individual in compliance with the foregoing provisions of this Article.

(b) In the event the Commission receives a written statement from an individual which complies substantially with Sections 3.1 and 3.3 hereof, but which is lacking elements specified in Sections 3.2 and/or 3.4, the Commission may accept and docket the statement as an unperfected charge. The Commission shall then notify the complainant in writing of the elements which must be supplied to perfect the charge. If the individual fails or refuses to perfect the charge as specified, the charge may be dismissed pursuant to Section 4.6 of these Rules and Regulations.

Section 3.6. Amendment–

(a) Notwithstanding any other provisions of these Rules and Regulations, a charge may be deemed sufficient when the Commission receives from a complainant a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge or any part thereof may subsequently be amended by the complainant to cure technical defects or omissions (including failure to properly subscribe or swear to the charge as hereinabove provided), or to set forth additional facts or allegations related to the subject matter of the original charge, and such amendments shall relate back to the original filing date.

(b) A charge may be amended by the complainant to substitute or name additional parties respondent, and such an amendment shall relate back to the original filing date, if (i) at the time of the amendment a separate charge could have been filed against such additional respondent; or (ii) such additional respondent had timely notice of the original charge and the fact it might be involved therein.

Section 3.7. Withdrawal of Charge–A charge or any part thereof may be withdrawn by the Complainant upon the consent of the Commission, at any time prior to an order of the Commission dismissing the charge or the issuance by the Commission @f a Complaint based on the charge. A complainant's request to withdraw a charge shall be in writing to the Commission and signed under oath or affirmation.

ARTICLE IV
Investigation

Section 4.1. Docketing and Service of Charge–Each charge, once filed, shall be docketed and assigned a case number by the Commission, and a copy of such charge shall, within ten (10) days following the date of filing, be served by the Commission on the named respondent.

Section 4.2. Maintenance of Employment Records--Notwithstanding any other provision of these Rules and Regulations, once a charge has been served on a respondent, the respondent shall preserve all personnel records, production records and other evidence which may be relevant to the case until the matter has been finally adjudicated.

Section 4.3. Investigation–After a charge has been filed, the Commission's staff shall institute an investigation to ascertain the facts relating to the unfair employment practice alleged in the charge and any amendments thereto. As part of its investigation the Commission may convene a fact-finding conference upon notice of not less than ten (10) days to all parties whose attendance will be required, for purposes of ascertaining the positions of the parties, identifying the issues in dispute, obtaining

evidence and determining the likelihood of a negotiated settlement.

Section 4.4. Adjustment During Investigation–If terms of settlement are agreed to between complainant and respondent during the investigation of a charge, the same shall be reduced to writing, signed by the parties and submitted to the Commission for approval. If so approved, the Commission shall thereupon enter an order incorporating the terms of settlement and dismissing the charge pursuant thereto without a finding on the merits of the charge. Said order shall be served by the Commission on all parties.

Section 4.5. Dismissal After Investigation–If after investigation of a charge, the investigative findings indicate that the charge is not supported by substantial evidence or that the Commission lacks jurisdiction of the charge, and this indication is concurred in by the Commission's Executive Director or his designee, the Executive Director shall thereupon cause to be served upon the complainant a Notice of Dismissal. The Notice of Dismissal shall advise the complainant that the charge is recommended for dismissal, and shall state the ground upon which it is to be dismissed, and shall be accompanied by a copy of the written investigation report. The Notice shall further advise that the complainant may object to dismissal of the charge and obtain consideration of the matter by the full Commission, by serving a demand therefor upon the Commission within thirty (30) days of the date of the Notice. If no such timely demand is served by the complainant upon the Commission, the charge shall be deemed dismissed as of the expiration of said thirty-day period, and the parties shall be so notified. In the event the complainant files a timely demand for reconsideration as herein provided, the matter shall be submitted to the full Commission for determination. A complainant's timely demand for reconsideration under this Section may be accompanied by such statement and/or evidence as the complainant may feel supports the charge.

Section 4.6. Failure to Proceed--A complainant has the responsibility to promptly provide the Commission with notice of any change in address or any prolonged absence from that current address so that he or she can be located when necessary during the Commission's investigation and consideration of the charge. In addition, a complainant is responsible for providing the Commission with necessary information and to be available for interviews and conferences, upon reasonable notice or request by the Commission. If a complainant cannot be located or does not adequately respond to reasonable requests by the Commission, the Commission's Executive Director is authorized to dismiss the charge for complainant's failure to proceed; Provided, that the Commission shall first afford the complainant written notice of his or her failure to comply with this Section at the last known address, and shall allow the complainant not less than thirty (30) days to respond thereto. Written notice of any dismissal pursuant to this Section shall be promptly provided by the Executive Director to the complainant and respondent and shall specify the nature of the complainant's noncompliance herewith.

Section 4.7. Commission Finding–After investigation, the Commission's staff shall submit to the Commission each charge which the investigation indicates is supported by substantial evidence, or in which a complainant has filed a timely demand for reconsideration of a Notice of Dismissal as provided in Section 4.5 of these Rules and Regulations. If the Commission finds that it has jurisdiction of the charge and that there is substantial evidence to support the charge, it shall order that conciliation be attempted in accordance with Article V of these Rules and Regulations. Otherwise, it may return the charge for further investigation, or order that the charge be dismissed. In the event that a charge is ordered to conciliation or ordered dismissed, the Commission shall promptly serve notice of such action upon all parties.

IN RE: MARLENE ROTHBARDT, Complainant, and NORTHEASTERN ILLINOIS UNIVERSITY, Respondent, Nos. 73WS-68, 73CF-1092 (January 12, 1977).

Synopsis: 1. Complainant's termination from employment became effective as of her last day of employment, even though the decision to terminate her may have been made considerably earlier, so that it was actionable under the provisions of the Act in effect on the latter date.

2. An employer's reconsideration of its decision to discharge its employee, resulting in reaffirmation of the original decision, constituted an independent action subject to challenge under the Act.

3. An employer's aversion to the employment of females with minor children is sexually discriminatory where no similar aversion is evident with regard to males with minor children.

4. There was sufficient evidence for the Administrative Law Judge to find that Complainant's Department Chairman influenced others with decision-making authority to support Complainant's termination, thus infecting their decisions with his discriminatory animus.

NO. 4-87-0205

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

CHARLES LARRANCE,
Petitioner,
v.
THE ILLINOIS HUMAN RIGHTS COMMISSION, Rights THE ILLINOIS DEPARTMENT OF HUMAN RIGHTS, COUNTY Commission MACON FARM BUREAU, COUNTRY CASUALTY INSURANCE COMPANY, COUNTRY INSURANCE COMPANY, COUNTRY MUTUAL INSURANCE COMPANY, COUNTRY LIFE INSURANCE COMPANY, and COUNTRY CAPITAL MANAGEMENT COMPANY,
Respondents.

Administrative Review of Illinois Human Nos. 1980SN0206 1980SN0207 1980SN0208 1980SN0209 1980SN0210 1980SN0211

JUSTICE McCULLOUGH delivered the opinion of the court:

Petitioner appeals an order of the Illinois Human Rights Commission (Commission) which dismissed his complaint. The Commission found it lacked jurisdiction to entertain the cause. (Ill. Rev. Stat. 1985, ch. 68, par. 7-102(A)(1).) Petitioner argues: (1) the Commission erred in retroactively applying *Board of Governors v. Rothbardt* (1981), 98 Ill. App. 3d 423, 424 N.E.2d 742; (2) principles of equitable tolling apply in the instant cause; (3) petitioner's formal charge should be found to relate back to his complainant information sheet (CIS) so as to create a timely charge; and (4) dismissal of petitioner's cause of action because of a State procedure denied him due process.

We affirm.

Petitioner filed his employment-discrimination charge on November 15, 1979. The administrative law judge found for petitioner. On October 27, 1982, respondents filed exceptions to the recommended order and decision, arguing lack of jurisdiction. Petitioner filed a motion to produce additional information. On January 7, 1982, the Commission denied petitioner's motion but on its own motion, remanded for a hearing on the circumstances surrounding the filing. Respondents filed suit in the circuit court to prohibit the hearing on remand. The circuit court ruled the Commission could order an additional hearing. On appeal, this court, in *Country Casualty Insurance Co. v. Human Rights Comm'n* (Nov. 30, 1984, 4th Dist. Gen. No. 4-83-0772, order under Supreme Court Rule 23), affirmed the circuit court. The facts relevant to the instant appeal stem from information obtained at the supplemental hearing.

Petitioner had been hired by respondents, Country Casualty Insurance Company, Country Insurance Company, Country Mutual Insurance Company, Country Life Insurance Company, and Country Capital Management Company (Country Companies) in 1956. In 1962, he was made agency manager in Macon County. On April 30, 1979, petitioner received a letter telling him his employment would be terminated, effective May 31, 1979.

On July 9, 1979, petitioner contacted the Fair Employment Practices Commission (FEPC) in Springfield. Petitioner testified that he had not talked to an attorney at that time. He completed a form entitled "Complainant Information Sheet." On that form, he indicated his termination was due to a heart attack which occurred in 1976. The only document he brought to the meeting was the termination letter. Petitioner stated that he told the intake representative that the name of his employer was Country Companies. George Crawford, the intake representative, told petitioner that he had until the end of November to file a formal charge. Petitioner never calculated the last day on which he could file the charge.

Petitioner further testified that Crawford took notes and raised a question about whether petitioner could file a charge. Crawford indicated the FEPC would decide whether or not to

accept the charge. Crawford needed to discuss the matter with his superiors and would contact petitioner. Crawford did not ask for additional information on July 9, 1979.

Petitioner stated Crawford gave him a brochure on July 9, 1979, and he looked at it. Between July 9, and October 29, 1979, petitioner called the FEPC office to check on the status of his cause. On October 29, 1979, the FEPC contacted him to ask for his employment contracts. He brought them in the same day. On October 31, 1979, he met with Crawford. They discussed his heart attack. After he brought in his employnent contracts, the individual companies were charged separately.

On November 15, 1979, petitioner signed a formal complaint. No one indicated a timeliness problem. Petitioner stated that although he met with an attorney concerning renewal income from Country Companies to which he felt entitled, he and his attorney did not discuss his employment discrimination action. He would have signed a charge on July 9, 1979, if he had been given one.

On cross-examination, petitioner agreed that the CIS form states it is not a legal charge. On October 4, 1979, his attorney drafted a letter seeking commissions. In the letter, counsel states that if the additional commission is not forthcoming, the employment discrimination action will be pursued. Petitioner denied delaying filing because of the dispute.

Crawford stated that anyone who wished to file a complaint would be assigned a representative, who gathered the needed information. If the criteria were met, the representative would prepare a charge. The complainant would then sign it. Crawford met plaintiff on July 9, 1979. The CIS is a general information sheet which a complainant completes. The intake officer reviews the CIS before interviewing the complainant to determine if there is a charge.

Crawford stated that he told petitioner he needed to determine a couple of factors and would have to discuss those issues with his supervisor before knowing whether the FEPC would be able to proceed with the charge. Crawford outlined the procedure for petitioner. Crawford believed that May 31, 1979, was the date

of the discriminatory act. This was the FEPC's position in 1979. Petitioner, therefore, had 180 days from that date to file his action. He told petitioner the FEPC would decide whether it would accept the charge for filing. Crawford stated that the brochure he gave petitioner did not contain an indication that the FEPC would automatically file complaints or that a complainant may demand a charge be filed.

Crawford further stated that at the time petitioner came in charges were not automatically accepted for filing. The policy changed after July 1980. Petitioner's charge was not accepted on July 9, 1979, and Crawford did not draft a charge for him. Crawford had a question about whether petitioner was an employee. However, he covered all the jurisdictional prerequisites and could have prepared a charge on July 9, 1979.

Crawford stated that petitioner cooperated. After Crawford had a meeting with his supervisor he prepared a charge on October 31, 1979. He and his supervisors had determined that petitioner was an employee under the Fair Employment Practices Act (Ill. Rev. Stat. 1979, ch. 48, par. 852(c)). Petitioner signed the charge on November 15, 1979.

Crawford admitted that now the Commission will file a charge if a complainant insists even if the jurisdictional prerequisites are not fulfilled.

Sandra Jean Kimberly, an intake representative with the Commission, stated that when she first started, a complainant had 180 days from the last day of employment to file a charge. Now, a complainant has 180 days from the date he is told of his termination to file. She believed the change occurred after January 1, 1980. However, it had always been a practice to accept a charge if the complainant wanted one filed, regardless of whether the intake representative wanted him to file a charge. She tells complainants this fact. The policy in effect when plaintiff filed his charge was to file charges even if a question existed about their validity.

The documents indicate plaintiff was not told that he could insist on filing a charge and Crawford asked plaintiff to bring in his contracts on July 9, 1979.

A supplemental recommended order and decision (SROD) was filed on November 12, 1985. The hearing officer found *Rothbardt* applied but that the Commission's actions caused the tardy filing. Therefore, the hearing officer felt that the Commission had jurisdiction pursuant to United States Supreme Court cases. He also found the November 15, 1979, charge was not an amendment of an earlier charge so did not relate back to the CIS. The Commission did not follow the recommendation and found that it did not have jurisdiction. It also found the United States Supreme Court cases were distinguishable.

Initially, petitioner argues *Rothbardt* should not apply retroactively to his cause because he justifiably relied on an administrative interpretation of the charge-filing limitations period. He had no choice but to rely upon the administrative agency. Respondents point out that the *Rothbardt* court itself retroactively applied its decision, that the degree of untimeliness is irrelevant in determining retroactivity, and petitioner's reliance on existing administrative interpretation of the law does not affect the applicability of *Rothbardt* to his case.

In *Rothbardt*, this court held that an aggrieved employee had 180 days from the time he was notified of termination of employment to file a charge under the Fair Employment Practices Act, interpreting section 8 of the Fair Employment Practices Act. (Ill. Rev, Stat. 1973, ch. 48, par. 858.) Rothbardt, a college professor, was notified that she would not be given tenure. She then received a terminal contract. She filed a charge within 180 days of her last actual day of work but in excess of 180 days of the date of the notice. The Board of Governors raised a jurisdictional question throughout.

The circuit court found the agency lacked jurisdiction over the cause. The appellate court affirmed, holding that timely filing as a necessary condition to the FEPC's jurisdiction. In determining that the period started to run at the time notice was given, the court relied on *Delaware State College v. Ricks* (1980), 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498, where the court reached a similar result. This court affirmed dismissal of Rothbardt's complaint. The court noted that the time limitation was an inherent part of the right created. (See also *Pickering v. Human Rights Comm'n* (1986), 146 Ill. App.3d 340, 496 N.E.2d

746 (where the court held that the 180-day charge-filing limitation period was an inherent part of the employment discrimination action created by the statutes); *Lee v. Human Rights Comm'n* (1984), 126 Ill. App.3d 666, 467 N.E.2d 943.) Section 8 of the Fair Employment Practices Act was incorporated into the Illinois Human Rights Act (Human Rights Act) as section 7-102(A)(1). Ill. Rev. Stat. 1985, ch. 68, par. 7-102(A)(1).

Petitioner in the instant cause does not contest in this court that the charge-filing limitation period is an inherent part of the right created. However, he argues that this court should not apply *Rothbardt* to his situation but should only apply it prospectively. The decision of a court is generally applied retroactively to the case under consideration. The criteria for determining prospective or retroactive application of a decision are: (1) a decision to be applied prospectively must establish a new principle of law; (2) will the purpose and effect of the new decision be best served by prospective or retroactive application; and (3) the equities of the situation. *Revoal v. Human Rights Comm'n* (1984), 128 Ill. App.3d 70, 470 N.E.2d 54.

It is part of the inherent power of the court to determine whether its decision should be prospectively or retroactively applied. (*Lane v. Sklodowski* (1983), 97 Ill. 2d 311, 454 N.E.2d 322.) Reliance is a factor to be considered. (*Brown v. Metzger* (1984), 104 Ill.2d 30, 470 N.E.2d 302.) However, as a general rule, a decision will be applied retrospectively unless the court expressly declares that its decision is a clear break with the past, such as when a court explicitly overrules its own past precedent, disapproves a practice that it has previously approved, or overturns a well established body of lower court authority. (*People v. Boswell* (1985), 132 Ill. App.3d 52, 476 N.E.2d 1154.) Judicial interpretation of a statute does not necessarily constitute a change in the law. *People v. Crete* (1986), 113 Ill. 2d 156, 497 N.E.2d 751.

Plaintiff argues *Rothbardt's* interpretation should not control his case essentially because *Rothbardt* was decided after he had filed his complaint and while the decision of the hearing officer was pending. He argues his reliance on the intake officer's statement and the FEPC's interpretation of the statute should bar retroactive application. Parties have a right to rely on the

decisions of the supreme court. (*Moehle v. Chrysler Motors Corp.* (1982), 93 Ill.2d 299, 443 N.E.2d 575; *Garcia v. Hynes & Howes Real Estate, Inc.* (1975), 29 Ill. App.3d 479, 331 N.E.2d 634.) Reliance on administrative interpretations is entitled to weight in determining whether a decision should be given retroactive or prospective application, but it is not controlling. (*People ex rel. Ponder v. Bensinger* (1974), 57 Ill.2d 55, 310 N.E.2d 161.) It, as well as lower court opinions, is subject to review and modification by the supreme court.

Although a court of review may also give significant weight to an agency's 'interpretation of a statute which it is charged with enforcing, the agency's interpretation is not binding on the court. (*People v. Roos* (1987), 118 Ill.2d 203, 212, 514 N.E.2d 993, 998; *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n* (1983), 95 Ill.2d 142, 447 N.E.2d 295.) An agency, however, is bound by an uncontested judicial interpretation of a statute. *Spraic v. United States R.R. Retirement Board* (9th Cir. 1984), 735 F.2d 1208, 1211.

The charge-filing limitation period is an inherent part of the employment discrimination action created by the statutes. The *Rothbardt* case was the first judicial interpretation of this type of language in Illinois, and its interpretation is binding on the agency. Since timely filing is a jurisdictional part of the right created and the 180 days is counted from the time of the discriminatory act, petitioner here has no cause of action. The Commission was correct in dismissing the action.

An administrative agency can only act pursuant to its statutory authority. (*City of Chicago v. Fair Employment Practices Comm'n* (1976), 65 Ill.2d 108, 357 N.E.2d 1154; *Pickering*, 146 Ill. App.3d 340, 496 N.E.2d 746.) Any action outside of that authority is void. Since the agency interpretation is controlled by the judicial interpretation of a statute, the agency was bound by *Rothbardt* and lacked authority to hear plaintiff's complaint. Interpretation of the statute did not create new law, there were no past precedents to break with, and petitioner's reliance on the administrative interpretation needs to be balanced with the potential harm to respondents, who raised the issue throughout.

Petitioner next argues that the charge-filing period should

be tolled because the agency misled him. In *Pickering*, plaintiff was employed as a sales manager when his position was terminated. At the time of termination, he signed a release of all of his claims against his employer. Subsequently, he filed an employment discrimination action arguing he had been terminated because of a physical disability. Pickering argued that equitable tolling and estoppel concepts should bar enforcement of the 180-day charge-filing limitations period. The appellate court found to the contrary, noting the distinction between statutes of limitations and limitations periods which are an inherent part of the right created. Concepts of equitable stoppel, tolling, and waiver usually apply to statutes of limitations, not limitations periods which are inherent parts of the right of action created. See also *Fredman Brothers Furniture Co. v. Department of Revenue* (1985), 109 Ill.2d 202, 486 N.E.2d 893, for a discussion of the distinctions between the two types of limitations.

The appellate court in *Pickering* found that estoppel did not apply. In *Lee v. Human Rights Comm'n* (1984), 126 Ill. App.3d 666, 467 N.E.2d 943, the appellate court stated the 180-day charge-filing limitations period was jurisdictional. The *Lee* court, however, stated that if appropriate factors were present, the employer would be estopped from raising the issue.

Petitioner urges this court to find equitable tolling here based on the language in *Lee* and *Dartt v. Shell Oil Co.* (10th Cir. 1976), 539 F.2d 1256. *Dartt* is distinguishable from the instant case. In *Dartt* the court reviewed the filing limitations period in the Fair Labor Standards Act. The court noted the period was analogous to a statute of limitations so equitable modifications were appropriate. See also *Zipes v. Trans World Airlines, Inc.* (1982), 455 U.S. 385, 71 L. Ed. 2d 234, 102 S. Ct. 1127.

In the instant cause, no employer misconduct is involved so the applicability of the *Lee* exception need not be addressed. Additionally, agency representatives did not mislead the petitioner. The agency position and its interpretation of the law was correctly stated to petitioner. This interpretation was altered by a judicial decision. Therefore, neither the agency nor the employer intentionally misled petitioner to his disadvantage since both acted on the information available. Equitable tolling is a concept which should be applied to prevent injustice when the

agency has knowingly misled a complainant or in some manner acted unfairly. It does not apply under the instant circumstances.

Petitioner next argues that the Commission should have accepted the CIS as an unperfected charge and allowed the November 15, 1979, charge to relate back to it. It is uncontested that under the FEPC rules in effect in 1979, the FEPC could have accepted a charge for filing if it was written even though it lacked an element necessary for a perfected charge. A later amendment would relate back to the original unperfected charge.

Here, the hearing officer found, and the Commission approved the finding, that no unperfected charge was filed in a timely fashion. This is essentially a factual determination by the agency. Factual determinations of administrative agencies are considered prima facie true and correct. They will be affirmed unless they are contrary to the manifest weight of the evidence. *Department of Corrections v. Adams* (1986), 146 Ill. App.3d 173, 496 N.E.2d 1138.

Petitioner asserts this case is analogous to *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148, and therefore, he has a due process interest in preservation of his cause of action. In *Logan*, the United States Supreme Court held that a State may not terminate a complainant's cause of action because a State official, for reasons beyond the complainant's control, failed to comply with the statutorily mandated procedure. In *Logan*, plaintiff filed a *timely* complaint with the FEPC, alleging employment discrimination. The statute gave the FEPC 120 days to convene a fact-finding hearing. After the fact-finding determination, the FEPC had 180 days to decide whether it would issue a formal complaint. The FEPC failed to hold the fact-finding hearing within the 120 days. The Illinois Supreme Court affirmed a finding that the FEPC lost jurisdiction over the cause.

The United States Supreme Court reversed. It held the complainant had a protected property interest in the continuation of his cause of action such that it could not be eliminated by the State's failure to act. In a footnote, the United States Supreme Court specifically stated that it was not suggesting a State had to consider the merits of a claim which was not timely filed.

(*Logan*, 455 U.S. at 434 n.7, 71 L. Ed. 2d at 277 n.7, 102 S. Ct. at 1157 n.7.) Illinois courts have applied *Logan* to similar situations. (See *Lott v. Governors State University* (1982), 106 Ill. App.3d 851, 434 N.E.2d 569.) However, the instant situation is distinguishable from *Logan* and analogous to the situation stated in the footnote. Petitioner could not rely on an administrative interpretation to create a protected property interest in an action which was not timely under a judicial construction of the statute.

For the above reasons, we affirm the judgment of the Illinois Human Rights Commission.

Affirmed.

GREEN, P.J., and LUND, J., concur.

DATE: March 25, 1988
RE: Larrance v. Ill. Human Rights Commission, et al. General No. 4-87-0205

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court [Rule 368(b)] is filed in this court.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:mcb

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66970

October 6, 1988

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No. 66970 — Charles Larrance, petitioner, v. The Illinois Human Rights Commission, et al., respondents. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Stamos, J., took no part.

The mandate of this Court will issue to the Appellate Court on October 28, 1988.

No. 66970

In The Supreme Court of The State of Illinois

IN THE MATTER OF:

CHARLES LARRANCE

Appellant-Petitioner

vs.

THE ILLINOIS HUMAN RIGHTS COMMISSION, THE ILLINOIS DEPARTMENT OF HUMAN RIGHTS, MACON COUNTY FARM BUREAU, COUNTRY CASUALTY INSURANCE COMPANY, COUNTRY INSURANCE COMPANY, COUNTRY MUTUAL INSURANCE COMPANY, COUNTRY LIFE INSURANCE COMPANY, and COUNTRY CAPITAL MANAGEMENT COMPANY,

Appellee-Respondent.

Appeal from Fourth District Appellate Court of the State of Illinois

No. 4-82-0205

MEMORANDUM IN SUPPORT OF MOTION OF *AMICUS CURIAE* IN SUPPORT OF CHARLES LARRANCE'S PETITION FOR LEAVE TO APPEAL

Jerald Beene, by his attorney, Gary H. Palm, Mandel Legal Aid Clinic, respectfully submits this Memorandum of Law in support of Charles Larrance's Petition for Leave to Appeal filed in this case, and states as follows:

THIS COURT SHOULD ACCEPT THIS APPEAL BECAUSE IT PRESENTS A QUESTION OF GENERAL IMPORTANCE

Jerald Beene and approximately five thousand other complainants are directly, adversely affected by the Fourth District's decision below. They may lose their rights to pursue their charges of discrimination against their employers because of the faulty procedures of the Human Rights Department, and through no fault of their own. Jerald Beene was forced to have an attorney accompany him to the Human Rights Department (the "Department") to ensure that the Department would prepare a timely charge. Approximately five thousand persons have filed timely Complaint Information Sheets ("CIS"), which were accepted by the Department as "unperfected charges," meeting the statute of limitations criteria.[1]

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[1] The Department, pursuant to its Rules and Regulations, 56 Ill. Admin. Code, Section 2520. 350 b), accepts a written statement from a complainant (the CIS) as an unperfected charge. The Department estimated in 1987 that over 5000 such unperfected charges have been accepted since July, 1980. *See* Department of Human Right's Exceptions to the Recommended Order and Decision of the Administrative Law Judge at 18, n.4, (May 26, 1987) Jose Gonzales and St. Anne's Hospital, file no. 1789, charge no. 1987 CF-1488, affirmed by the Ill. Human Rights Commission (January 25, 1988).

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF: CHARLES LARRANCE *Complainant* AND COUNTRY CASUALTY INSURANCE COMPANY, et al., *Respondents*	CHARGE NO(S): 1980 SN 0206 et al.

ORDER AND DECISION

This matter comes before the Commission panel to review a Supplemental Recommended Order and Decision submitted by Administrative Law Judge Kenneth N. Parker, Jr. The Complainant claims that he was discriminated against because of a perceived handicap. The Respondent [1] claims that the Complainant did not file a charge of discrimination within 180 days after the alleged discriminatory event, as required by section 8 of the Fair Employment Practices Act.[2]

The Respondent claims that the failure of the Complainant to file a timely charge of discrimination deprives the Human Rights Commission of jurisdiction in this case. This matter was remanded to the Administrative Law Section to determine if the

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[1] The Respondents in this case are a group of related companies. Since they all have the same position with respect to the issues addressed in this Order and Decision, they will sometimes be referred to collectively as "the Respondent".

[2] The Fair Employment Practices Act has been repealed by the Human Rights Act. Under section 9-102 of the Human Rights Act, the cause of action does not abate. Instead, each charge pending at the time of repeal was assumed by the Human Rights Commission at the same stage of proceeding to which it had progressed prior to the effective date of the Human Rights Act.

Commission has jurisdiction to proceed to a decision on the merits of the Complainant's handicap discrimination claim.

SUPPLEMENTAL RECOMMENDED ORDER AND DECISION

The Administrative Law Judge finds that under the law which is in effect at this time the date of an alleged discriminatory termination is the date that the employee is informed that he is "terminated", not the last date of employment. Thus, if an employee is told that he is terminated on April 1, but is allowed to work until April 15, the employee must file a charge of discrimination within 180 days of April 1. If the employee waits until 180 days have elapsed from his last day of employment, the charge will not be timely. The Administrative Law Judge's finding with respect to the current state of the law is based upon the Appellate Court case of *Board of Governors v. Rothbardt,* 98 Ill App 3d 423, 53 Ill Dec. 951 (1981). It is undisputed that the *Rothbardt* standard is the law in Illinois today.

If the *Rothbardt* standard is applied to the claim made by the Complainant, the charge could not be considered timely. The Complainant filed the charge some 199 days after he received notice that certain employment contracts he had with the Respondents would not be continued.

The Complainant argued to the Administrative Law Judge that the *Rothbardt* standard should not be applied retroactively to this case. The *Rothbardt* decision came down in 1981, after the Complainant filed the instant charge. It is the Complainant's argument that it is unfair to apply the *Rothbardt* standard to a decision he made prior to the date that the Appellate Court decision was published.

The Administrative Law Judge states that the general rule in Illinois is that a court decision which interprets a statutory provision is applied retroactively. Judge Parker states that it is only in exceptional circumstances that a new court decision is applied prospectively. He points out that the rule announced in the *Rothbardt* decision was applied to Rothbardt herself, even though Rothbardt filed her charge well before the Appellate Court decision.

The Complainant argued in front of the Administrative Law Judge that a court decision should be applied prospectively if retroactive application would affect rights which had vested by reason of an earlier decision. The Complainant argues that the Fair Employment Practices Commission had ruled that the 180 day period began to run from the last day of employment. Since the Complainant relied upon this quasi-judicial decision, the *Rothbardt* rule should not be applied retroactively.

The Administrative Law Judge found that an individual may not acquire vested rights by relying on the law as interpreted by a judicial body, unless the judicial body is the court of last resort in the state. Since there had not been a binding declaration by a court of last resort with respect to the 180 day rule at the time that the Complainant filed his charge, he could not obtain a "vested right" in the prior law. Thus, the Administrative Law Judge ruled that the *Rothbardt* decision applied retroactively to the facts of this case. Accordingly, he finds that the Complainant failed to meet the 180 day deadline set out in the Fair Employment Practices Act, because he filed his charge more than 180 days after he received notice that hewould be terminated.

The Administrative Law Judge next considers whether the actions of the Fair Employment Practices Commission worked to deprive the Complainant of his right to try his case, without due process of law. In the case of *Logan v. Zimmerman Brush Company,* 455 U.S. 422 (1982) the United States Supreme Court ruled that state action could not work to deprive a Complainant of his right to try his case under the state anti-discrimination law. In other words, a Complainant has a property interest in a cause of action arising under Illinois law. This property interest cannot be taken away by the state without a hearing which comports with due process. Thus, the failure of *the state* to meet a statutory deadline cannot deprive the Complainant of his cause of action.

The Complainant argued in front of the Administrative Law Judge that his failure to file his charge on a timely basis was due to the fact that he relied upon misinformation from a state agency. Thus, he contends that it was the state which took away his cause of action. Accordingly, he argues that this case is analogous to *Logan v. Zimmerman Brush Company.*

The Administrative Law Judge accepted the Complainant's arguments with respect to the Constitutional question. On page 11 of the Supplemental Recommended Order and Decision the Administrative Law Judge states that it was "state action" which caused the late filings. Judge Parker states that it would be a deprivation of due process to dismiss the instant claim based upon the action of the state. Accordingly, the Administrative Law Judge recommends that the case be considered on its merits, because the Supreme Court case of *Logan v. Zimmerman Brush Company* prevents the dismissal of a cause of action based upon the malfeasance of the state.

Finally, the Administrative Law Judge rejects the Complainant's argument that he filed a timely charge on July 9, 1979. The Complainant contended that he gave the Fair Employment Practices Commission all the information it needed to file a charge on that date. It is his contention that the signing of a document which contains his allegations is a mere technical detail. Thus, the signing of the ultimate charge in this case should "relate back" to the date on which the Fair Employment Practices Commission received the information upon which the charge was based. Since this date was within the 180 day filing period, the Complainant argues that his charge was timely filed. Judge Parker rejects this argument based upon the clear wording of the statute which requires that charges be in writing, signed and filed within 180 days of the alleged discriminatory event.

THE RESPONDENT'S EXCEPTIONS

The Respondent argues that the case of *Logan v. Zimmerman Brush Company* does not apply to the facts of the case at bar. In *Logan* it was argued that the Complant's charge should be dismissed because the Fair Employment Practices Commission failed to convene a fact finding conference within 120 days of the filing of the charge. This position was upheld by the Illinois Supreme Court. *Zimmerman Brush Company v. Fair Employment Practices Commission,* 82 Ill.2d 99, 411 N.E. 2d 277 (1980). The U.S. Supreme Court said that such a rule violated the Complainant's right to due process. Justice Blackmun, speaking for the Court, said that the state may not finally destroy a property

interest without first giving the putative owner an opportunity to present his claim. of entitlement. This language is accompanied by a footnote which reads as follows:

> This is not to suggest, of course that the state must consider the merits of the claim when the *claimant* fails to comply with a reasonable procedural requirement or fails to file a timely charge. (*Logan*, supra, fn.7; emphasis in original)

As can be seen from the above quotation, the U.S. Supreme Court has made it crystal clear that the rationale behind the *Logan* decision does not apply when the claimant fails to file a timely charge. Thus, it appears that the *Logan* decision is not analogous to this case.

The Administrative Law Judge states, however, that it was not the Complainant's fault that the charge was not timely filed. Judge Parker states that the Complainant's failure to file on a timely basis was a direct result of the Commission's ruling and its employee's statement. Thus, he concludes that it was state action, and not the Complainant's fault which led to the failure to file a timely charge.

The problem with this analysis is that it directly contradicts the portion of the Supplemental Order and Decision which states that no one may obtain a vested right in a judicial determination unless the determination is made by the court of last resort in the state. When the employee of the Fair Employment Practices Commission told the Complainant that the filing period began to run on the last day of employment, the complainant was receiving the position of the Fair Employment Practices Commission, as stated in the case of *Rothbardt and Northeastern Illinois University,* 4 Ill FEP Rep. 8. This decision is clearly not an interpretation of the Fair Employment Practices Act by a Court of last resort in Illinois. Thus, under Judge Parker's own analysis, the Complainant could have obtained no vested right in the FEPC interpretation of the law. Accordingly, the fact that the Appellate Court reversed the Commission's decision cannot be considered a "taking" of the Complainant's "property" within the meaning of the due process clause. Since the Complainant had no *right* to rely on the position of the Fair Employment

Practices Commission, his failure to file a timely charge with the FEPC comes squarely within the wording of footnote 7 to *Logan v. Zimmerman Brush Company*. In view of the fact that the U.S. Supreme Court has specifically stated that the failure of a Complainant to file a timely charge does not, by itself, constitute a taking of a property interest without due process, the Administrative Law Judge's analysis must be rejected. The case of *Logan v. Zimmerman Brush Company* does not require that the Complainant be given a hearing, even though he did not file a timely charge.[3]

In his response to the Respondent's exceptions the Complainant sets forth another argument in support of his position that the Commission should consider this case on its merits. He states that even if the charge were not timely filed, and even if there were no Constitutional deprivation, his action in going to the Fair Employment Practices Commission and asking to file a charge worked to toll the 180 limitations. In other words, he argues that the 180 day time limitation is subject to concepts such as equitable tolling.

This position has recently been rejected by the Illinois Appellate Court. In the case of *Pickering v. Illinois Human Rights Commission,* 146 Ill.App.3d 340, 496 N.E.2d 746 (1986) the Appellate Court ruled that the 180 day filing deadline is not in the nature of a statute of limitations, subject to the doctrines of waiver, estoppel and equitable tolling. _____ . Ill.App.3d. __, 496 N.E. 2d 746, 750. According to the *Pickering* court, the failure to file within the 180 day period extinguishes the cause of action. Thus, once it is established that a timely charge was not filed, the Human Rights Commission no longer has jurisdiction over the case. The court went on to say that if the *employer* misleads the Complainant in a way which prevents him from filing a timely charge, the employer may be estopped from raising the

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[3] What we have said here applies only to instances where Commission employees transmit to Complainants correct information concerning the Commission's position. need not decide in this case if the due process clause of the Constitution is violated when a state employee gives a Complainant incorrect information which leads to an untimely filing.

180 day period as a defense. According to the *Pickering* Court, this is a narrow exception to the 180 day jurisdictional time limit.

In this case there is no evidence that the Respondent misled the Complainant with respect to the time for filing a charge of discrimination. Accordingly, the Complainant cannot argue that the defendant should be estopped from asserting the jurisdictional defense. Since it is quite clear that the Complainant did not file his charge within 180 days, under the *Pickering* decision it appears that the Human Rights Commission is without jurisdiction to proceed.

The Complainant urges the Commission to follow the federal court case of *Dartt v. Shell Oil Company,* 539 F.2d 1256 (10th Cir. 1976). The Court of Appeals for the Tenth Circuit held in that case that equitable tolling would apply to the action or lack of action of a federal employee. The *Dartt* case is based upon the proposition that the filing period under federal law is a statute of limitations. This is consistent with the ruling of the U.S. Supreme Court that the filing period under Title VII of the Civil Rights Act 1964 is a statute of limitations, and not jurisdictional. *Zipes v. Transworld Airlines, Inc.,* 455 U.S. 385 (1982). We find much merit in the approach used by the Supreme Court in *Zipes.* We are not, however, writing on a clean slate. As stated above, the Illinois Appellate Court has already determined that the *Zipes* doctrine does not apply in Illinois. The 180 day deadline is in the nature of a jurisdictional limitation, and not a statute of limitation. We have no authority to decline to follow a binding ruling of the Appellate Court of Illinois. Consequently, we find that there is no jurisdiction vested in the Human Rights Commission to reach the merits of this case.

IT IS THEREFORE ORDERED

1. That the Complaint filed in the instant matter is dismissed with prejudice on the ground that the Human Rights Commission has no jurisdiction over the claims made by the Complainant.

2. That the Supplemental Recommended Order and Decision in this matter is reversed. The factual findings of the Administrative Law Judge are accepted by the Commission only

to the extent that they are not inconsistent with this Order and Decision.

3. That all motions and exceptions not previously dealt with by the Commission, and not specifically mentioned in this Order and Decision are hereby denied.

4. That this Order and Decision is final and appealable.

(Commissioner Lillian A. Mitchell, Commissioner Randall Raynolds, Commissioner Howard R. Veal, Sr.)

HUMAN RIGHTS COMMISSION

_____
Lillian A. Mitchell

_____
Randall Raynolds

_____
Howard R. Veal, Sr.

Entered:_____

No. 88-135

FILED

FEB 7 1989

JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States
October Term, 1988

CHARLES LARRANCE,

Petitioner,

v.

THE ILLINOIS HUMAN RIGHTS COMMISSION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

BRIEF OF RESPONDENTS, MACON COUNTY FARM BUREAU, COUNTRY CASUALTY INSURANCE COMPANY, COUNTRY INSURANCE COMPANY, COUNTRY MUTUAL INSURANCE COMPANY, COUNTRY LIFE INSURANCE COMPANY, AND COUNTRY CAPITAL MANAGEMENT COMPANY, IN OPPOSITION

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LIST OF PARTIES

Charles Larrance, Petitioner

The Illinois Human Rights Commission, Respondent

The Illinois Department of Human Rights, Respondent

Macon County Farm Bureau*, Respondent

Country Casualty Insurance Company*, Respondent

Country Insurance Company* (currently known as Country Preferred Insurance Company), Respondent

Country Mutual Insurance Company*, Respondent

Country Life Insurance Company*, Respondent

Country Capital Management Company*, Respondent

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* Parent Corporation: Illinois Agricultural Association ("IAA"). Affiliate companies of IAA include: Illinois Agricultural Service Company; Illinois Agricultural Auditing Association; AgriVisor Services, Inc.; IAA Trust Company; Illinois Milk Producers Association; GROWMARK, Inc.; Interstate Producers Livestock Association; Illinois Agricultural Holding Co.; IAA Federal Credit Union; Prairie Farms Dairy, Inc.; IAA Recreation Association; FS Credit Corporation; Illinois Livestock Marketing Company; P.F.D. Supply Corporation; Ice Cream Specialties, Inc.; Muller-Pinehurst Dairy, Inc.; Mid-Co Commodities, Inc.; Country Capital Growth Fund, Inc.; Mo-Kan Express, Inc.; Hiland Dairy Company; Roberts Dairy Company; FS Farmco, Inc.; Country Capital Tax Exempt Bond Fund, Inc.; Country Capital Income Fund, Inc.; Best Ever Companies, Inc.; Ideal-American Dairy; Grantland FS, Inc.; Country Investors Life Assurance Company; Chapman Ice Cream Co.; East Side Jersey Dairy, Inc.; Illinois Grain Corporation; Northwest Farm Bureau Insurance Company; Country Capital Money Market Fund, Inc.; Farmers Export Co.; Agri-Trans Corporation; Pinnacle Insurance Company; Illinois Cooperative Futures Company; FS Consolidated Feeds, Inc.; and CC Services, Inc.

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No. 88-135

In The
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CHARLES LARRANCE,

Petitioner,

v.

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On Petition for a Writ of Certiorari to the Illinois Supreme Court

BRIEF OF RESPONDENTS, MACON COUNTY FARM BUREAU, COUNTRY CASUALTY INSURANCE COMPANY, COUNTRY INSURANCE COMPANY, COUNTRY MUTUAL INSURANCE COMPANY, COUNTRY LIFE INSURANCE COMPANY, AND COUNTRY CAPITAL MANAGEMENT COMPANY, IN OPPOSITION

Respondents, Macon County Farm Bureau, Country Casualty Insurance Company, Country Insurance Company, Country Mutual Insurance Company, Country Life Insurance Company, and Country Capital Management Company, respectfully request that this Court deny the petition for writ of certiorari.

JURISDICTION

The order sought to be reviewed was issued on October 6, 1988 by the Illinois Supreme Court.

The statutory provision Petitioner believes confers jurisdiction on this Court to review the order is 28 U.S.C.A. § 1257(3) (West 1966).

This Court lacks jurisdiction over the Petition. The order of the Illinois Supreme Court denying leave to appeal is not a reviewable judgment under 28 U.S.C.A. § 1257(3) (West 1966).

This Court lacks jurisdiction over the questions presented in that neither raises a federal question.

STATEMENT OF THE CASE

Petitioner, Charles Larrance, was Macon County Agency Manager for Respondents (hereinafter referred to as "Country Companies"). He had contractual agreements with Country Casualty Insurance Company, Country Insurance Company, Country Mutual Insurance Company, Country Life Insurance Company, and Country Capital Management Company. Larrance was notified by letter of April 27, 1979, received on April 30, 1979, that his contracts would be terminated effective May 31, 1979. His last day of work was May 31, 1979. (May 21, 1985 Report of Proceedings before the Illinois Human Rights Commission, Vol. VII, hereinafter referred to as "R. Vol. VII" at 3, 4, 28.)[1]

On July 9, 1979, Larrance went to the Commission's office in Springfield, Illinois. (May 21, 1985 Report of Proceedings before the Commission, Vol. VIII, hereinafter referred to as "R. Vol. VIII" at 14; R. Vol. VII at 4.) He filled out a form entitled "Complainant Information Sheet," asserting discrimination on

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[1] At the time Larrance filed his charge, the Illinois Human Rights Commission was known as the Illinois Fair Employment Practices Commission. The Illinois Human Rights Act was known as the Illinois Fair Employment Practices Act. For convenience, Country Companies will refer to both agencies as "the Commission" and both statutes as "the Act."

the basis of physical handicap and identifying "Country Companies, Box 2000, Bloomington, Illinois 61701" as his employer. (Resp. Ex. 1; R. Vol. VII at 116.) After filling out the form, Larrance was interviewed by George Crawford, a Commission intake representative. (R. Vol. VIII at 14, 15.) Crawford took notes during the interview. (Pet. Ex. 3; R. Vol. VII at 111; R. Vol. VIII at 21.) The purpose of the interview was to elicit information from Larrance about the alleged discrimination. (R. Vol. VIII at 15.) The Commission did not in 1979, or at any other time, conduct an investigation before a charge was filed. (R. Vol. VIII at 80, 107.)

As of July 9, 1979, the Commission was operating under a Rapid Charge Processing System designed to facilitate the swift acceptance and handling of charges. (Resp. Ex. 17; R. Vol. VII at 126.) Crawford told Larrance that he had 180 days, or until "some time towards the end of November," to file his charge. (R. Vol. VIII at 45.) It was Crawford's practice to tell people to file their charges "as soon as possible." (*Id.* at 78.) Larrance, however, never determined the last day on which his charge could be timely filed. He paid "no particular concern" to it. (R. Vol. VII at 70-72.)

Larrance gave Crawford information about his case. He provided Crawford with the identities of the parties with whom he had agency manager contracts. (R. Vol. VIII at 73-74.) Larrance also complained to Crawford on July 9 about the renewal commissions he was being paid by Country Companies. (*Id.* at 72.)

There is no evidence that Larrance asked the Commission to file a charge on July 9. (R. Vol. VII at 6-7, 9-10.) Had Larrance requested that the Commission type and file a charge on that date, the agency would have done so. (R. Vol. VIII at 131-132, 161; Resp. Ex. 5; R. Vol. VII at 119; Resp. Ex. 3; R. Vol. VII at 118.) Sandra Kimberly, Larrance's expert witness from the Commission, was unaware of anyone who had ever been turned away after insisting on filing a charge. (R. Vol. VIII at 161.) Larrance's claim that the Commission "refused" to accept his charge has no support in the record.

Crawford determined at the July 9 interview that "there were a couple of items . . . needed to be pursued." (*Id.* at 27.) He wrote in his notes of July 9 that he wanted to see Larrance's agency manager contracts. (Pet. Ex. 3; R. Vol. VII at 111; R. Vol. VIII at 21.) Crawford "generally left it to the complaining party . . . to contact [him] with the information." (R. Vol. VIII at 28.) It was Crawford's practice to get as much information as possible at the initial interview to "save a lot of unnecessary paperwork." (*Id.* at 105.) A Commission form Larrance was given no later than July 9 states that complainants should bring "any papers or documents that relate to [their] charge" to the initial interview. (Resp. Ex. 18; R. Vol. VII at 127.) Crawford asked Larrance on July 9 to provide him with copies of the agency manager contracts. (R. Vol. VIII at 191.)

Larrance did not return to the Commission or produce the agency manager contracts until October 29, more than 180 days from the date on which he learned of his termination. (R. Vol. VII at 11, 66.)

On October 3, 1979, Larrance retained Jon Robinson as his general attorney and consulted with him regarding his claim of discrimination. (*Id.* at 22, 54; Larrance's Answers to Interrogatories 1 and 2.) The "bulk" of the discussion on that date concerned renewal commissions. (*Id.* at 96.) Even before meeting with Robinson, Larrance had discussed the subject of renewal commissions with Mr. Schleuter and Mr. Cassens of Country Companies. (*Id.* at 80-81.)

On October 3, 1979, Larrance and Robinson still had over three weeks to file a charge within 180 days of notice of Larrance's termination. On October 4, 1979, Robinson wrote a letter to Duane Miller, Executive Vice President of Country Companies. (Resp. Ex. 2; R. Vol. VII at 117.) This letter, which Larrance knew Robinson was writing, "zeroed in on the renewal activity." (R. Vol. VII at 79, 85.) The letter stated as follows:

> [T]he Illinois Fair Employment Practices Commission has been contacted regarding the basis for his termination, and we would like to pursue this if your Company is not willing to pay him the three percent (3%) commission on renewals.

(Resp. Ex. 2.) The content of the letter was what Larrance wanted Robinson to say. (R. Vol. VII at 79, 85.) Larrance testified that had the renewal dispute been resolved in his favor, he would not have filed a charge of discrimination. (*Id.* at 77.)

Larrance did not file his charge until November 15, 1979, 199 days after Country Companies notified him of his termination. (Pet. Ex. 7; R. Vol. VII at 113.)

REASONS FOR DENYING THE WRIT

A. The Order Of Which Petitioner Seeks Review Is Not A Reviewable Order.

Larrance prays that this Court issue a writ of certiorari "to review the Illinois Supreme Court order that denied Petitioner leave to appeal from an order of the Illinois Appellate Court for the Fourth District." (Petitioner's Opening Brief, hereinafter referred to as "Pet. Op. Br." at 1.) The Illinois Supreme Court is the court of last resort in Illinois. Denials of leave to appeal "carry no connotation of approval or disapproval of the appellate court action, and signify only that four members of this court, for reasons satisfactory to them, have not voted to grant leave." *People v. Vance,* 76 Ill. 2d 171, 183, 390 N.E.2d 867, 872 (1979). This Court consistently has held under these circumstances that if any judgment is properly reviewable under 28 U.S.C.A. § 1257 (West 1966) it is that of the intermediate court, not the denial of leave to appeal. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 160 (1954); *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676, 678 n.1 (1968). Thus, to the extent Larrance seeks review of the Illinois Supreme Court order, the petition should be dismissed for lack of jurisdiction.

B. The Questions Presented Are Not Reviewable Because They Compel Re-Examination Of The State Court's Findings Of Fact.

Both questions presented purport to be grounded on the premise that the Commission actively interfered with Larrance's charge filing. (Pet. Op. Br. at i.) As a result, the Court cannot address the merits of Larrance's due process claim without first reviewing the appellate court's findings of fact on this pivotal

issue. The premise that the Commission actively interfered is untenable. The appellate court, with the benefit of the complete common law record, found:

> [A]gency representatives did not mislead the petitioner. The agency position and its interpretation of the law was correctly stated to petitioner. This interpretation was altered by a judicial decision. Therefore, neither the agency nor the employer intentionally misled petitioner to his disadvantage since both acted on the information available.

(Petitioner's Appendix, hereinafter referred to as "App." at 22a.) The court further found that the agency did not treat Larrance "unfairly." (App. at 23a.) These findings were supported by the record. Indeed, in the nine years since Larrance filed his charge, no one has suggested that the information the Commission gave him about the filing deadline was wrong. The fact that a judicial decision retroactively modified the Commission's interpretation does not support Larrance's contention that the Commission misled him, refused to file his charge or treated him unfairly.

This Court would have to reject the findings of fact below as a prerequisite to consideration of the asserted federal questions. That is something the Court generally does not do and for which there is no basis in this case. *Grayson v. Harris,* 267 U.S. 352, 358 (1925); *See also Lloyd A. Fry Roofing Co. v. Wood,* 344 U.S. 157, 160 (1952).

C. The First Question Presented Raises No Federal Question.

Contrary to what Larrance asserts, the decision of the appellate court does not give rise to a constitutional issue.

1. The Constitutional Right Upon Which Larrance's Due Process Claim Is Premised Does Not Exist.

Larrance's due process claim is based on an erroneous interpretation of the Illinois Constitution. In Section I.A. of his argument, Larrance contends that he had "an entitlement to be free from discrimination guaranteed by the Illinois consti-

tution . . . " (Pet. Op. Br. at 13.) This entitlement purportedly arises from Article I, Section 19 of the Illinois Constitution, which provides as follows:

> All persons with a physical or mental handicap . . . shall be free from discrimination, unrelated to ability in the hiring and promotion practices of any employer.

ILL. CONST. art. I, § 19. According to Larrance, "[t]his state-created right is the foundation for Petitioner's claim of employment discrimination." (Pet. Op. Br. at 12.) The courts of Illinois, however, disagree with Larrance's construction of Article I, Section 19. In *Yount v. Hesston Corp.*, 124 Ill. App. 3d 943, 949, 464 N.E.2d 1214, 1219 (2d Dist. 1984), the court held that Section 19 "limits a claim of discrimination based on [handicap] to 'the hiring and promotion practices of any employer.' " Accordingly, it does not encompass cases "involving termination and discharge from employment." *Id.* (relying on *Thakkar v. Wilson Enterprises, Inc.*, 120 Ill. App. 3d 878, 458 N.E.2d 985 (1st Dist. 1983) and *Greenholdt v. Illinois Bell Telephone Co.*, 107 Ill. App. 3d 748, 438 N.E.2d 245 (4th Dist. 1982)).

Because the right upon which the petition is premised does not exist, the writ should be denied.

2. The Circumstances Of Larrance's Tardy Charge Filing Do Not Entitle Him To Due Process Protection.

Larrance would have this Court believe that his case is "virtually identical" to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). (Pet. Op. Br. at 11.) This contention is baseless for two reasons. First, *Logan* did not involve the 180 day charge filing period in question. Second, *Logan* involved a clear case of agency misconduct.

Logan addressed the Commission's obligation to convene a fact-finding conference within 120 days after the claimant filed his or her charge. Significantly, Logan could not schedule the conference himself within the statutorily dictated period. Responsibility for doing so was exclusively within the control of the agency. Responsibility for filing a timely charge, however,

is within the exclusive control of the complainant. He may submit it on the first day after an unfair employment practice has been committed or any day thereafter, as long as filing is accomplished within 180 days. The Commission was statutorily obligated to accept all charges timely filed. Thus the 180 day charge filing period is fundamentally different than the time requirement involved in *Logan*.

This Court has acknowledged the distinction. Although it held that Logan, whose charge was timely, could not be deprived of his constitutionally protected property interest without an opportunity to present his claim of entitlement, the majority cautioned: "This is not to suggest, of course, that the State must consider the merits of the claim when the *claimant* fails to comply with a reasonable procedural requirement, or fails to file a timely charge." 455 U.S. at 434 n. 7. The court further held:

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, [citation omitted] or, in an appropriate case, filing fees. [citation omitted] And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule.

Id. at 437. In his separate opinion, Justice Blackmun, joined by Justices Brennan, Marshall, and O'Connor, agreed that: "Logan does not and could not quarrel with the requirement that complainants file their charges in a timely fashion." *Id.* at 441. Thus the due process right the Court recognized in *Logan* does not arise here because there was no timely charge. Although Larrance contends that the Commission sat on his charge, that claim is untenable in view of the fact that the Commission complied with all prevailing legal requirements. Unlike Logan, Larrance cannot point to a statutory requirement that the Commission breached.

As an additional point of distinction, *Logan* was a clear case of agency misconduct. The Commission simply failed to convene a fact-finding conference within 120 days. In contrast, and as the appellate court found, agency representatives did not

mislead Larrance or treat him unfairly. Under these circumstances *Logan* is inapt, and the due process issues which arose there are absent.

3. Because Larrance Had Counsel Within The 180 Day Period, No Due Process Issue Arises.

The relief Larrance ultimately seeks, forgiveness for his untimely charge filing, is unavailable because he had a lawyer. As set forth in Country Companies' Statement of the Case, Larrance engaged Jon Robinson as early as October 3, 1979. Although Larrance claims he did not hire Robinson to attend to his Commission claim, the record belies this assertion. In answers to interrogatories, submitted under oath, Larrance confirmed that Robinson was consulted "regarding his claim of handicap discrimination" on October 3, 1979 and that he had two phone calls and two personal visits with Robinson regarding his "claim of handicap discrimination" before that date. (Larrance's Answers to Interrogatories 1 and 2.)

As a matter of law, a claimant may not overcome a tardy charge filing if he consulted counsel during the statutory filing period. *Leite v. Kennecott Copper Corp.*, 558 F. Supp. 1170, 1173-74 (D. Mass. 1983), *aff'd*, 720 F.2d 658 (1st Cir. 1983); *Keyse v. Cal. Tex. Oil Corp.*, 590 F.2d 45, 47 (2d Cir. 1978); *Needham v. Beecham, Inc.*, 515 F. Supp. 460, 467 (D. Maine 1981); *Hamel v. Prudential Ins. Co.*, 640 F. Supp. 103, 105 (D. Mass. 1986). In *Leite*, the claimant's argument that the responsible agency had misinformed him regarding the statute of limitations did not prevent the court from granting the defendant's motion for summary judgment. Similarly, in *Hamel*, the court held:

> Conceeding [sic] for the purposes of this motion that the federal agency committed some administrative error in delaying preparation of the charge, this did not relieve Hamel's counsel of the ultimate responsibility of monitoring his client's claim. That is precisely what a lawyer is paid to do. It is the job of the lawyer, not the agency, to keep the client's claim from going stale. In circumstances such as this, equity does not require tolling the limitations

> period . . . Civil rights laws need not be interpreted so as to make them traps for the unwary. On the other hand, neither need the laws be interpreted so as to protect those who ought know better from their own indolence.

640 F. Supp. at 105.

The evidence below established that Larrance and Robinson intentionally withheld the charge while attempting to negotiate with Country Companies over renewal commissions. On October 4, 1979, Robinson wrote to Country Companies' Executive Vice President, Duane Miller. In that letter, Robinson stated:

> In addition, the Illinois Fair Employment Practices Commission has been contacted regarding the basis for his [petitioner's] termination, and we would like to pursue this if your company is not willing to pay him the three percent (3%) commission on renewals.

(Resp. Ex. 2; R. Vol. VII at 117.) This letter confirms not only that Robinson knew about Larrance's discrimination claim, but that he was authorized to write about it and, with Larrance's blessing, elected to use the claim as a bargaining chip to exact renewal commissions from Country Companies. Thus, unlike Logan, Larrance cannot in good faith assert that his claim went stale for reasons beyond his control.

Because Larrance, after retaining counsel, intentionally delayed filing his charge to increase his bargaining position with Country Companies, he cannot establish a deprivation of due process.

4. There Is No Basis For Larrance's Contention That The Commission Has Unlawfully Hindered Other Claimants.

Larrance tries to enhance his petition by suggesting that "thousands" of claimants have had their claims lost "because the FEPC failed to act within the jurisdictional limit." (Pet. Op. Br. at 11.) This argument brutally misconstrues the record. Larrance relies exclusively on an amicus brief filed by someone named Jerald Beene. (App. at 28a.) The brief nakedly asserts

that approximately five thousand people may lose their rights "through no fault of their own" if by filing the Commission's intake form, called a Complainant Information Sheet ("CIS"), they are not deemed to have filed a timely charge.

Larrance argued below that his completed CIS form should have been deemed a timely charge. The appellate court disagreed. Larrance has not challenged that finding in his petition. Accordingly, the procedure which purportedly has caused others to lose their claims is not at issue before this Court. Even if it were, Larrance cannot successfully assert that if he lost any rights it was through no fault of his own.

D. The Second Question Presented Fails to Raise A Federal Question.

Larrance's question regarding the retroactive application of *Board of Governors Of State Colleges And Universities For Northeastern Illinois University v. Rothbardt.* 98 Ill. App. 3d 423, 424 N.E.2d 742 (4th Dist. 1981), *appeal denied,* No. 55433 (Nov. 30, 1981), does not create a federal question. This Court has held repeatedly that the Constitution neither prohibits nor requires retroactive application of judicial decisions. As Justice Cardozo wrote in *Great Northern Railway Co. v. Sunburst Oil and Refining Co.,* 287 U.S. 358, 364 (1932): "We think the federal constitution has no voice upon the subject." *See also Linkletter v. Walker,* 381 U.S. 618, 629 (1965). In light of this authority, the second question presented fails to raise a federal question and thus is not one over which this court has jurisdiction under 28 U.S.C.A. § 1257 (West 1966).

Petitioner's reliance on *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), is misplaced. In *Chevron,* the court considered the retroactivity of its own *Rodrigue* decision, not the retroactivity of an intermediate state court decision. Nowhere in *Chevron* did the court mention due process. Moreover, the retroactivity question in *Chevron* required interpretation of the Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* Hence, the petitioner there was able to present a federal question.

Even if the Court had a jurisdictional basis for reviewing the retroactivity of *Rothbardt,* Larrance could not establish that

the appellate court exercised its discretion improperly. *Rothbardt* neither overruled clear past precedent nor was a case of first impression whose resolution was not clearly foreshadowed. The charge filing statute at issue refers neither to the last day worked nor notice of termination. Rather, it states that a charge must be filed within 180 days "after the date that an unfair employment practice allegedly has been committed . . . " ILL.REV. STAT. ch. 48, para. 858 (1979). This language clearly is susceptible to the interpretation articulated in *Rothbardt*. Indeed, this Court twice has held that similar statutory language supports the *Rothbardt* construction. *See Del. State College v. Ricks,* 449 U.S. 250 (1980); *Chardon v. Fernandez,* 454 U.S. 6 (1981).[2] In both *Ricks* and *Chardon* the Court held the complaints time-barred, thus giving its decision retroactive effect.

Larrance also fails to cite a single judicial decision, state or federal, upon which he relied in determining when to file his charge. Indeed, he claims that the Commission unilaterally decided when the charge would be accepted. Even if there were evidence of reliance and a case which justified it, Larrance's reliance argument would be unavailing due to the fact that he had a lawyer.

Lacking a federal basis, Larrance's retroactivity question is insufficient to invoke this Court's jurisdiction.

E. Larrance's Asserted Due Process Claims Are Logically Incompatible.

Larrance's contentions that (1) like Logan he was the victim of active agency interference and (2) the retroactive application of *Rothbardt* violated his due process are analytically irreconcilable. His first argument is premised on the claim that the Commission caused his charge to be untimely by letting it lapse

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[2] Before Larrance filed his charge, at least two federal courts of appeals foreshadowed *Rothbardt* by holding that the time for filing a charge of employment discrimination began to run upon notice of the adverse employment decision. *See Bireline v. Seagondollar,* 567 F.2d 260 (4th Cir. 1977), *cert. denied,* 444 U.S. 842 (1979); *Jackson v. Hayakawa,* 605 F.2d 1121 (9th Cir. 1979); *cert. denied,* 445 U.S. 952 (1980); *Abramson v. Univ. of Hawaii,* 594 F.2d 202, 209 (9th Cir. 1979).

or by refusing to file it. His second argument presumes that the Commission complied with "existing law" (Pet. Op. Br. at 21), but that the law changed to Larrance's detriment. Larrance cannot have it both ways. Either the Commission actively interfered with his charge filing or it did not. The fact that the Commission complied with "existing law," as Larrance acknowledges, compels the conclusion that there was no active interference. Yet because, as established above, retroactive application of *Rothbardt* has no due process implications, Larrance's second argument topples as well. The Court is left with no justification for granting the writ.

CONCLUSION

This Court lacks jurisdiction over the questions presented. Assuming jurisdiction exists, Larrance's reasons for granting the writ are groundless. Accordingly, the writ should be denied.

Respectfully submitted,

MACON COUNTY FARM BUREAU, COUNTRY CASUALTY INSURANCE COMPANY, COUNTRY INSURANCE COMPANY, COUNTRY MUTUAL INSURANCE COMPANY, COUNTRY LIFE INSURANCE COMPANY, AND COUNTRY CAPITAL MANAGEMENT COMPANY

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-1135

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

CHARLES LARRANCE,

Petitioner,

v.

THE ILLINOIS HUMAN RIGHTS COMMISSION, THE ILLINOIS DEPARTMENT OF HUMAN RIGHTS, MACON COUNTY FARM BUREAU, COUNTRY CASUALTY INSURANCE COMPANY, COUNTRY INSURANCE COMPANY, COUNTRY MUTUAL INSURANCE COMPANY, COUNTRY LIFE INSURANCE COMPANY, and COUNTRY CAPITAL MANAGEMENT COMPANY,

Respondents.

Petition for Certiorari to the
Supreme Court of the
State of Illinois

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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PRELIMINARY STATEMENT

In the decision below, the Illinois courts have again allowed a state-created cause of action for discrimination to be destroyed because of the failure of the agency to comply with statutory time limits. As such, the decision below violates the Fourteenth Amendment under this Court's unanimous holding in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), a case which Illinois agencies and courts have ignored. Certiorari should be granted so that victims of discrimination in Illinois receive hearings on the merits rather than losing their claims as a result of the actions of the state agency.

INTEREST OF AMICUS CURIAE

The Edwin F. Mandel Legal Aid Clinic ("the Clinic") has for the past 20 years devoted a significant portion of its practice to the representation of victims of employment discrimination. Its clients have frequently suffered from the failure of the

state agency to comply with required procedures and have a strong interest in seeing that the law governing those claims is correctly applied. The Clinic represented the plaintiff in Logan, as well as the plaintiffs in Bennett v. Tucker, 827 F.2d 63 (7th Cir. 1987), discussed infra.

The Illinois courts and agencies have repeatedly refused to follow Logan. Instead, they continue to allow the failure of state employees to comply with statutory time limits to negate individuals' property rights in statutorily-created causes of action.

The Illinois Human Rights Act, like the Fair Employment Practices Act which preceded it ("the Act"), is the sole state remedy for persons claiming to be victims of discrimination. It is the Clinic's experience that employment discrimination claimants generally do not seek counsel to represent them until sometime after their charge has been filed with the state agency.

Indeed, the purpose of the administrative procedure for prosecuting claims of employment discrimination was to encourage claimants to bring their claims pro se. In the decision below, the Illinois courts have yet again penalized pro se plaintiffs for the actions of the state agency. The Clinic's clients have a strong interest in ensuring that Illinois courts do not continue to ignore Logan.

STATEMENT OF FACTS

For purposes of the petition, the following facts are relevant (references are to the opinion of the Fourth District of the Illinois Appellate Court's decision reprinted in the appendix accompanying Petitioner's brief):

1. Petitioner was discharged for allegedly discriminatory reasons. App. 16a.

2. Petitioner attempted to file a charge with the Illinois Fair Employment Practices Commission, now the Illinois Department of

Human Rights ("the Department") well within the statutory time limit. App. 16a.

3. Although the Act created an absolute right to file the charge, the Department's then applicable procedures did not permit petitioner to file his charge until the Department had completed its investigation. App. 17a-18a.

4. By the time the Department completed its investigation, the statutory time period for filing a charge had expired. App. 19a.

5. The Illinois courts held that petitioner could not pursue his charge because it had not been timely filed. App. 22a-23a, 26a.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW ALLOWING NULLIFICATION OF A CLAIM DUE TO FAILURE BY THE STATE AGENCY COMPLY WITH STATUTORY TIME LIMITS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN LOGAN V. ZIMMERMAN BRUSH CO.

The Illinois Supreme Court, by refusing to review the Appellate District's decision, has destroyed petitioner's statutory claim

due to the failure of the state agency to comply with statutory time limits, without ever allowing that claim to be considered on the merits. Although petitioner complied with the Department's procedural requirements, his claim was terminated because the Department denied him his statutory right to file a charge within the applicable time limit. As argued in the Petition for Certiorari, penalizing petitioner for the state's failure is in direct conflict with Logan. Therefore, certiorari should be granted. Supreme Court Rule 17.1(c).

Moreover, as was the case in Logan, the decision below "unambiguously divides claims--and thus, necessarily, claimants--into two discrete groups that are accorded radically different treatment." 455 U.S. at 438-439. Those which the Department timely files are adjudicated; those which it does not are terminated. As Justices Blackmun, Brennan, Marshall and O'Connor concluded in

Logan, the random nature of the state's failure to comply with its statutory requirements--resulting in the destruction of the claim--violated the Equal Protection Clause of the Fourteenth Amendment. 455 U.S. at 441-442. Indeed, as Justice Powell and then-Justice Rehnquist pointed out in Logan, the creation of two classes of claims depending solely on whether the state agency complied with its time limits bears no rational relationship to any legitimate government interest. Id. at 443-444.[1]

---

[1] The consistent body of federal decisions interpreting Title VII, upon which the Act was modeled, is further evidence of the irrationality of the decision below. Federal courts have consistently held that the information provided by petitioner to the Department -- which the Department refused to accept as a charge -- satisfies the parallel Title VII filing requirements. See, e.g., Love v. Pullman Co., 404 U.S. 522, 525 (1971); Steffen v. Meridian Life Insurance Co., 859 F.2d 534, 542 (7th Cir. 1988); Rabzak v. County of Berks, 815 F.2d 17, 20 (3d Cir. 1987); Tillman v. City of Boaz, 548 F.2d 592, 594 (5th Cir. 1977).

II. CERTIORARI SHOULD BE GRANTED TO RECTIFY THE ILLINOIS COURTS' AND AGENCIES' REFUSAL TO COMPLY WITH LOGAN.

The Illinois human rights agencies and the Illinois courts have ignored this Court's decision in Logan. This Court should grant the Petition for a Writ of Certiorari so that victims of discrimination in Illinois are not deprived of their constitutional rights to due process and equal protection.

The Department frequently takes responsibility for various aspects of processing the charge because most complainants are proceeding pro se. However, through inadvertence, negligence or bureaucratic inefficiency, the Department sometimes misses a deadline or otherwise fails to comply with a required procedure. Despite the fact that the claimant was not at fault in the Illinois agencies and courts have consistently penalized them for the Department's failures and held that the

charge is barred.[2] Inexplicably, this pattern of decisions has not changed since Logan.

In Logan, the Illinois Supreme Court had held that the Department's failure to conduct a fact finding conference within 120 days deprived the agency of jurisdiction and terminated the charge. This Court reversed.

Similarly, in Board of Governors v. Illinois Fair Employment Practices Commission, 78 Ill. 2d 143, 399 N.E.2d 590 (1979), the Illinois Supreme Court decided that the agency's failure to complete its investigation within the required 180 days deprived the agency of jurisdiction and terminated the complainant's claim. Despite this Court's subsequent holding in Logan, the Department refused to reassert jurisdiction in these cases. A federal

---

[2] The effect of the decision below is to absolutely destroy the statutory cause of action of petitioner (and those similarly situated) as the Act does not permit a judicial action if a charge was not timely filed with the Department.

class action was filed and the Court of Appeals for the Seventh Circuit rejected the Department's arguments that Logan did not apply to these claims. Bennett v. Tucker, 827 F.2d 63, 69 (7th Cir. 1987).

Now, in this case, the Illinois courts have once again allowed agency delay to bar a claim before the Department. It is important to the victims of discrimination in Illinois that they be able to rely on the state agencies without fear that agency mistakes will destroy their claims. As noted, nearly all these complainants are proceeding pro se--indeed, the procedures were designed to encourage pro se proceedings--so that there is no lawyer watching the agency to make sure it meets each deadline and satisfies each procedural requirement.

While complainants may in appropriate cases be held responsible for their own mistakes and delays, Logan dictates that they not be penalized for the mistakes and

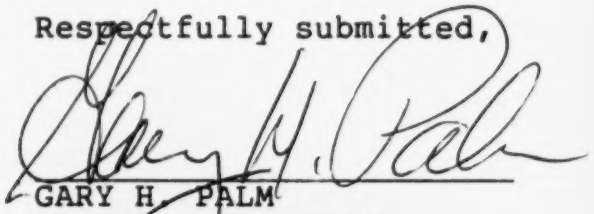
delays of state employees. If complainants lose it should be because of a decision on the merits or because of some failure by them. Otherwise their rights to due process and equal protection are violated.

CONCLUSION

For the reasons stated above the petition for a writ of certiorari should be granted.

Dated: Chicago, Illinois
February 2, 1989

Respectfully submitted,



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February 2, 1989

Larrance v. Illinois Human Rights Commission,
No. 88-1135

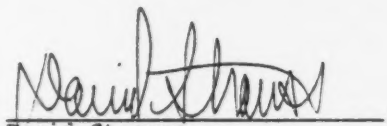
On behalf of the respondents Macon County Farm Bureau, Country Casualty Insurance Company, Country Insurance Company, Country Mutual Insurance Company, Country Life Insurance Company and Country Capital Management Company, I hereby consent to the filing of an amicus curiae brief on behalf of petitioner in the above case by Gary H. Palm of the Edwin F. Mandel Legal Aid Clinic.

James Fiffer

January 27, 1989

Larrance v. Illinois Human Rights Commission,
No. 88-1135

On behalf of the respondent, Illinois Human Rights Commission, I hereby consent to the filing of an amicus curiae brief on behalf of petitioner in the above case by Gary H. Palm of the Edwin F. Mandel Legal Aid Clinic.

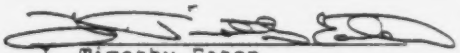


David Strauss

January 30, 1989

Larrance v. Illinois Human Rights Commission,
No. 88-1135

On behalf of the petitioner, Charles Larrance, I hereby consent to the filing of an amicus curiae brief on behalf of petitioner in the above case by Gary H. Palm of the Edwin F. Mandel Legal Aid Clinic.



J. Timothy Eaton

January 27, 1989

Larrance v. Illinois Human Rights Commission,
No. 88-1135

On behalf of the respondent, Illinois Human Rights Department, I hereby consent to the filing of an amicus curiae brief on behalf of petitioner in the above case by Gary H. Palm of the Edwin F. Mandel Legal Aid Clinic.

Shelvin L Hall

Shelvin Hall

CERTIFICATE OF SERVICE

Gary Palm, attorney of record for the Edwin F. Mandel Legal Aid Clinic, certifies that he is a member of the Bar of the Court, and that on February 2, 1989 he caused to be served by first class mail a copy of the Brief Amicus Curiae on the following:

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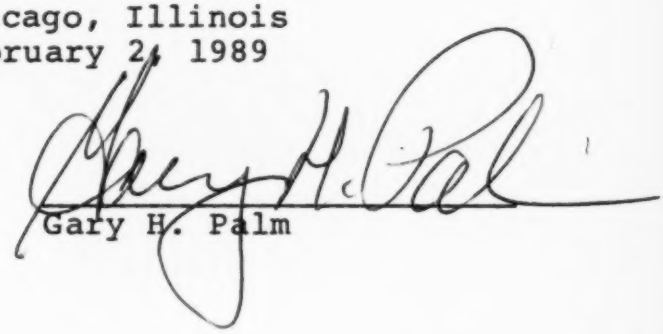

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(4)

No. 88-1135

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In The
Supreme Court of the United States
October Term, 1988

CHARLES LARRANCE,

Petitioner,

v.

THE ILLINOIS HUMAN RIGHTS COMMISSION, et al.,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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Pickering v. Human Rights Commission, 146 Ill.App.3d 496 N.E.2d 746 (2d Dist. 1986) 2

Gonzalez v. Illinois Human Rights Commission Slip Opinion attached as Appendix 2

No. 88-1135

In The
Supreme Court of the United States
October Term, 1988

CHARLES LARRANCE,

Petitioner,

v.

THE ILLINOIS HUMAN RIGHTS COMMISSION, et al.,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

ARGUMENT

THE APPELLATE COURT'S DETERMINATION THAT THE 180 DAY FILING PERIOD TO FILE A CLAIM UNDER THE ILLINOIS FAIR EMPLOYMENT PRACTICES ACT IS JURISDICTIONAL AND NOT A STATUTE OF LIMITATIONS SHOULD BE RECONSIDERED IN LIGHT OF MORE RECENT AUTHORITY BY ANOTHER DISTRICT OF THAT SAME COURT TO THE CONTRARY.

The appellate court below refused to consider whether Petitioner's claims that the Agency's actions in misleading him

as to what was required before he could file his complaint and its misinterpretation of when he could file his complaint might toll the time period for filing his claim. The court construed the 180 day filing period as jurisdictional and consequently it concluded concepts of equitable estoppel would not be applicable. *See* page 22A of Appendix to Petition. Both the Illinois Human Rights Commission and the appellate court relied on the case of *Pickering v. Human Rights Commission,* 146 Ill.App.3d 340, 496 N.E.2d 746 (2d Dist. 1986) in reaching their conclusion. *See* page 22A and 34A of Appendix to Petition. In *Pickering* the appellate court held that the 180 day charge-filing limitation period was an inherent part of an employment discrimination action and was therefore jurisdictional and not subject to defenses that could be raised against a statute of limitations.

On February 2, 1989, in the most recent opinion of the appellate court on this subject, it rejected the *Pickering* analysis in a case very similar to Petitioner's involving agency conduct and held that the 180 day filing period is more appropriately viewed as a statute of limitations and therefore subject to the defenses of waiver, estoppel and equitable tolling. In *Gonzalez v. Illinois Human Rights Commission,* (Slip Opinion attached hereto as Exhibit A to Supplemental Brief), the appellate court held that its most recent interpretation of the 180 day filing period as being a statute of limitations was in line with this Court's ruling in *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982) which held in interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. (1970) §§2000e *et seq.,* that filing a timely charge of discrimination with the EEOC was not a jurisdictional prerequisite to suit in the Federal court but was in the nature of a statute of limitations subject to waiver, estoppel, and equitable tolling. Sl. Op. at p. 8a, fn. 2. The *Gonzalez* court agreed with this Court that the employer's right to prompt notice of claims would not be undercut by treating the period in question as a statute of limitations. 455 U.S. at 398.

CONCLUSION

Since both the Illinois Human Rights Commission and the appellate court refused to consider whether the Agency's conduct in this case might have tolled the time for filing Petitioner's claim, Petitioner prays that in view of this most recent authority, that as alternative relief to the granting of his Petition for Writ of Certiorari or his request for summary reversal, that this court issue a writ to the Appellate Court of Illinois for the Fourth District to reconsider its opinion in this case in light of the most recent Appellate Court of Illinois' decision on this matter.

DATED: February 20, 1989

Respectfully submitted,

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APPENDIX

FOURTH DIVISION
FEBRUARY 2, 1989

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

88-0600

JOSE GONZALEZ
Petitioner,

v.

ILLINOIS HUMAN RIGHTS COMMISSION, AND ST. ANNE'S HOSPITAL,
Respondents.

APPEAL FROM THE STATE OF ILLINOIS HUMAN RIGHTS COMMISSION

JUSTICE LINN delivered the opinion of the court:

Petitioner, Jose Gonzalez, was discharged from St. Anne's Hospital. He filed a charge with the Illinois Department of Human Rights, alleging that the hospital had discharged him in retaliation for his previously filing discrimination charges against St. Ann's. The Human Rights Commission dismissed his complaint as being untimely filed and therefore did not reach the merits.

Gonzalez appeals, contending that his complaint was improperly dismissed because the 180-day period for filing charges in accordance with the Illinois Human Rights Act is not a jurisdictional limitation, but rather a statute of limitations that can be equitably tolled and should have been tolled under the circumstances of this case. He had given his typed and signed statement of the charge to the agency within the 180-day period, but it had not been retyped on the Department's charge form and verified until after that period. Gonzalez additionally argues that the oath and affirmation requirement of the Act is not jurisdictional in the sense that it must be satisfied at the time charges are required to be filed.

We reverse and remand.

BACKGROUND

Gonzalez, a former mental health technician with St. Anne's Hospital, was discharged on July 28, 1983. He filed charges with both the Equal Employment Opportunity Commission ("EEOC") and the Illinois Department of Human Rights ("Department"), claiming that the discharge was discriminatory. The EEOC found no reasonable cause for the charge and therefore issued its letter dismissing the charge and notifying Gonzalez of his right to sue in the Federal district court. The Illinois Human Rights Department, however, eventually determined that Gonzalez' charge was based on substantial evidence and filed a complaint with the Human Rights Commission, naming St. Anne's Hospital as respondent.

The hospital filed a motion to dismiss on jurisdictional grounds. The administrative law judge ("ALJ") held an evidentiary hearing on the motion because of her belief that there were factual issues relating to the timeliness of the filing of the charge.

At the hearing Gonzalez testified that he contacted his attorney on January 10 or 11, 1984, concerning a possible action under the Illinois Human Rights Act. (Ill. Rev. Stat. 1983, ch. 68, pars. 1-101 *et. seq.*) The attorney typed up the charge using the Illinois Department of Human Right's client information sheet ("CIS"), a form that provides spaces for the pertinent information and for signature, but no space for notarization or oath.

On January 20, 1984, at 12:11, Gonzalez took his signed charge (the CIS form) to the Department for filing. This was 176 days after his discharge. When he went to the Department's office to file the charge, he was told to wait for the Department to retype it, after which he was to sign it and have it notarized. At this time, the general procedure of the Department was for the CIS form to be submitted to the receptionist for stamping, after which it was given to an intake investigator, who would interview the complaining party. Gonzalez waited two or three hours to be called. However, at 4:30 or 5:00 p.m. a Department representative told Gonzalez that no typist or notary was available and that he should go home. Someone would then mail

him the retyped charge for his signature and for notarization. The receptionist assured Gonzalez that there would be no problem with this procedure.

Gonzalez further testified at the hearing that he called the Department three or four days later to inquire about the charge. He was told that it was on the way. On January 31, 1984, seven days after the expiration of the 180-day period, the Department mailed the charge to him. On that same day, the Department mailed a letter to St. Anne's, notifying the hospital that Gonzalez had "filed a charge" against the hospital, which the Department "docketed * * * as an unperfected charge pursuant to its Rules and Regulations," and that the enclosed charge did not require a response at that time since it was unperfected.

On February 13, 1984, Gonzalez returned a signed and notarized copy of the charge, which the Department received on the twenty-third of the month. The Department then investigated the charge and, based upon a finding of substantial evidence of unlawful discrimination, filed its complaint with the Illinois Human Rights Commission against St. Anne's on February 7, 1986.

St. Anne's filed a motion to dismiss the complaint on the grounds that the Department lacked jurisdiction because Gonzalez' charge was not filed within the 180-day limitation set out in section 7-102(A)(1) of the Act. (Ill. Rev. Stat. 1985, ch. 68, par. 7-102 (A) (1).) In response, the Department, on Gonzalez' behalf, denied the untimeliness argument, stating that the requirements of the Act had been satisfied by his filing of the CIS form within the 180-day period.

The Department told the ALJ that in over 5,000 cases since July 1980, it had docketed unperfected charges. This procedure allowed aggrieved parties to file the CIS form as a charge, without the oath or affirmation, and permitted the treatment of such filings as timely once the Department received back from the

claimants retyped charges that were signed and sworn.[1] As far as the Department was concerned, the CIS form contained sufficient information to constitute a charge within the Act. The Act itself does not require any specific form of pleadings. See Ill. Rev. Stat. 1987, ch. 68, par. 1-103(C) (defining charge as "an allegation filed with the Department by an aggrieved party * * * ") and par. 7-102(A)(2) ("The charge shall be in such detail as to substantially apprise any party properly concerned as to the time, place, and facts surrounding the alleged civil rights violation.").

The ALJ's recommended order and decision concluded that the charge should be dismissed, finding that the charge was not timely; therefore, the Department and Commission had no jurisdiction over the matter. Further, the ALJ held that the tolling doctrine was inapplicable and could not waive the jurisdictional limit imposed by section 7-102(A) of the Act.

The Department filed lengthy exceptions to the recommended order and decision and the hospital filed its response, for the Commission's review.

On January 25, 1988, the Commission entered its order and decision dismissing Gonzalez' complaint on the ground that the 180-day period was jurisdictional and that the CIS form did not meet the oath and affirmation requirement of the Act. By its decision, the Commission rejected the Department's contention that its administrative rule conferred jurisdiction under the Act because the rule allowed the submission of a CIS form to be treated as a valid charge, subject to being perfected by oath. Further, the Commission ruled that Gonzalez' own conduct, not that of the Department, had prevented the timely filing of the charge.

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[1] The Department's CIS form allows the aggrieved party to set out the pertinent allegations. There is a space for signature, but not for oath or notarization. The Department then takes the CIS information and retypes it on another form. This form, entitled "Charge of Discrimination", contains a printed block that states "I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief." There is a space for the complainant's signature underneath, as well as a space for notarization.

OPINION

We note, initially, that the ALJ and Commission did not accord much weight to the Department's admitted practices and procedures. Unless these procedures clearly violated the intent of the Human Rights Act, they cannot be considered void. The Department is the body charged with implementing a claimant's filing under the Act; absent compelling reasons, Gonzalez should not lose the right to a hearing on his claim on the grounds that the Department's instructions to him were incorrect.

The ultimate issue in this case, however, is whether Gonzalez satisfied the statutory requisites for filing his charge. The two, related aspects of this issue that the parties raise are: (1) whether the 180-day filing period is jurisdictional (as opposed to being a statute of limitations subject to equitable doctrines, such as tolling) and (2) whether the absence of the claimant's oath or affirmation at the time the charge is filed is fatal when the charge itself is filed within 180 days but the oath is supplied later. In our view, the case turns on whether the oath, when supplied, cured any technical defect in the charge Gonzalez had filed within the 180-day period. If so, the filing was timely.

The provision that governs the timely filing of the charge states, "Within 180 days after the date that a civil rights violation allegedly has been committed, a charge in writing under oath or affirmation may be filed with the Department by an aggrieved party or issued by the Department itself under the signature of the Director." Ill. Rev. Stat. 1987, ch. 68, par 7-102 (A)(1).

St. Anne's argues that the legislature intended the 180-day period in section 7-102(A)(1) to be jurisdictional because section 7-102(B), which sets out the ten-day period in which the Department is to give notice of the charge to the respondent, contains an express caveat that the time period in that subsection "shall not be construed to be jurisdictional." (Ill. Rev. Stat. 1987, ch. 68, par. 7-102(B).) The hospital reasons that because the legislature could have put a similar provision in subsection A, but did not, the reasonable construction (by negative implication) is that the 180-day period in that section *is* jurisdictional.

We are not persuaded that Section 7-102(A)(1) must be construed as jurisdictional in the sense urged by respondent simply because the legislature specifically expressed an intent in subsection B on the effect of an entirely separate time period. The legislature was silent as to the effect of the 180-day period in subsection A, when it could have included express language making that period jurisdictional. Without a divining rod, we cannot discover the legislative intent on this issue.

To determine whether a statutory time period is "jurisdictional," rather than one that can be tolled or waived in some instances, the courts generally attempt to decide whether the right of action created by the particular act is a substantive right unknown at common law and one that also makes the time for filing the charge an inherent element of the right created. If so, it cannot be treated as a statute of limitations. (*Pickering v. Illinois Human Rights Commission* (2d Dist. 1986), 146 Ill. App. 3d 340, 346-49, 496 N.E.2d 746; cf. *Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission* (1987), 71 Ill. 2d 61, 373 N.E.2d 1307) (noting that under predecessor Fair Employment Practices Act, 180-day filing period, while "mandatory," was not "jurisdictional" in the sense that it could not be waived). In other words, if meeting the time period is a condition precedent of the plaintiff's right to seek a remedy, the given time period is jurisdictional. (See *Fredman Brothers Furniture Co., Inc. v. Department of Revenue* (1985), 109 Ill. 2d 202, 209-10, 486 N.E.2d 893, 895.) If the period is treated as a statute of limitations, however, the equitable tolling doctrine or other means of abatement may apply if the circumstances justify it. (*E.g., Zipes v. Trans World Airlines, Inc.* (1982), 455 U.S. 385, 393, 71 L. Ed. 2d 234, 243, 102 S. Ct. 1127, 1132.) The difference in treatment is that a jurisdictional limitation is considered a part of the liability or cause of action itself, while a statute of limitation operates to preclude the remedy only. *Fredman Brothers Furniture Co., Inc. v. Department of Revenue.*

Under the hospital's analysis, the statute is jurisdictional and the charge that Gonzalez attempted to file within the 180-day period was insufficient because it did not contain the oath or affirmation of Gonzalez at that time. Under this theory the facts surrounding his filing of the charge and what he was told

about filing procedures is irrelevant; it would only be pertinent to the application of an equitable doctrine that would abate the limitations period.

Both the ALJ and the Commission relied heavily on the Second District Appellate Court's decision in *Pickering v. Illinois Human Rights Commission* (1986), 146 Ill. App. 3d 340, 496 N.E.2d 746. The plaintiff in that case filed a charge of age and handicap discrimination almost a year after his termination. Rejecting the argument that section 7-102 (A) of the Act should be treated as a statute of limitations, the court concluded that since "the act itself creates substantive rights unknown at common law and at the same time prescribes the time within which a party must file" the charge, "the 180-day filing requirement must be deemed to be jurisdictional." 146 Ill. App. 3d at 346, 496 N.E.2d at 750.

In *Pickering,* the claimant had done nothing to pursue his claim for almost a year after the alleged discrimination, despite conferring with an attorney, and the Department dismissed the charge. The Commisssion sustained the dismissal, citing lack of jurisdiction over the matter. The trial court, on administrative review, reversed and remanded for a hearing on the plaintiff's contention that tolling, waiver, or other equitable consideration applied. In reversing the trial court, the appellate court concluded that once it found the 180-day period to be jurisdictional, no equitable doctrines were available to circumvent that limit, with the narrow exception of estoppel. Citing *Lee v. Human Rights Commission* (1984), 126 Ill. App. 3d 666, 467 N.E.2d 943, the *Pickering* court held that the 180-day period would be extended only if the agency's misleading conduct caused the claimant to miss the deadline. 146 Ill. App. 3d at 349, 496 N.E.2d at 752.

Even under *Pickering,* Gonzalez would appear to have a good claim to estoppel as an exception to the limitation period. We do not adopt *Pickering's* rationale or holding that the 180-day period is jurisdictional, however. Because of our conclusion that the filing in this case was timely, we need not decide the broader question of whether the filing period in section 7-102(A)(1) is

jurisdictional or a statute of limitations.[2]

We believe that the narrower, dispositive issue in this case centers on the oath and affirmation requirement of section 7-102 (A): Does the unperfected charge, timely filed, become a nullity if the oath is supplied after the 180-day period, or does the supplying of the oath "relate back" to the original filing? The hospital argues that the absence of Gonzalez' verified signature on the CIS form he filed with the Department is absolutely fatal to his ability to maintain his claim. Like the jurisdictional argument, this one provides for no leeway, no relaxation of rigid rules.

As an alternative argument, the hospital cites Gonzalez' own conduct as bring responsible for the dismissal of his charge. This suggests, perhaps unfairly, that one who files a defective charge toward the end of the limitation period is less diligent than one

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[2] *Pickering* acknowledged that one of the criteria for determining whether the limitation period is jurisdictional is whether the right in question is created by the statute or whether the statute merely provides the procedural framework for redressing the right. The Illinois Human Rights Act states its aim "to secure and guarantee the rights established by Sections 17, 18, and 19 of Article I of the Illinois Constitution of 1970." (Ill. Rev. Stat. 1987, ch. 68, par 1-102(C).) Several courts view that Act as the procedural vehicle for enforcing the constitutional right to be free from unlawful discrimination. (*E.g. Thakkar v. Wilson* (1983), 120 Ill. App. 3d 878, 458 N.E.2d 985; *Dilley v. Americana Healthcare Corp.* (1984), 129 Ill. App. 3d 357, 472 N.E.2d 596.) *Pickering's* holding that at least some of the rights secured in the Act were of statutory, rather than constitutional, origin apparently influenced the court's decision that the 180-day period was an inherent part of the cause of action and thus jurisdictional.

We believe, however, that the more persuasive authority on the jurisdictional issue is the United States Supreme Court's interpretation of the Federal counterpart to Illinois Human Rights Act. In *Zipes v. Trans World Airlines, Inc.* (1982), 455 U.S. 385, 393, 71 L. Ed. 2d 234, 243, 102 S. Ct. 1127, 1132, the Court interpreted Title VII of the Civil Rights Act of 1964, 42 U.S.C. (1970) §§ 2000e, *et. seq.*, holding that filing a timely charge of discrimination with the EEOC was not a jurisdictional prerequisite to suit in the Federal court but was in the nature of a statute of limitations subject to waiver, estoppel, and equitable tolling. After enumerating its considered reasons for this construction of the time period, the Court noted that employers' right to prompt notice of claims would not be undercut by treating the period as a statute of limitations. 455 U.S. at 398, 71 L. Ed. 2d at 247, 102 S. Ct. at 1135.

who starts the filing procedure earlier and therefore has a better chance of curing any defect within the 180-day period.

Gonzalez does not contend that the Department should act upon unsworn charges or that he was excused from furnishing his oath for the charge contained in his CIS form. Rather, he points out that the Department itself treated the unsworn CIS form as an "unperfected" charge, but a charge nonetheless, to be docketed in accordance with its rules. Section 2520.350 of the Department's rules allow the acceptance of a charge which "complies substantially" with the requirements of the Act but "which is not notarized" or is lacking other elements. Such statement is treated as an unperfected charge, to be docketed, and the Department is to send the claimant a letter specifying which elements must be supplied to perfect the charge. The very language of this section demonstrates the validity of the unperfected charge; it is not considered void, merely inchoate. The Department, in fact, takes jurisdiction over the charge; it merely declines to proceed unless and until the missing element, such as notarization, is supplied.

This practice is consonant with another Department rule, section 2520.360, which allows "a charge or any part thereof" to be "amended by the complainant to cure technical defects or omissions, or to clarify or amplify allegations made therein * * * , and such amendments shall relate back to the original filing date." Under this rule, if the absence of the oath at the time the charge was filed is considered a technical omission, Gonzalez' filing was not untimely. This is how the Department viewed it.

We agree with the Department's interpretation of its own rules. Gonzalez was expressly assured by the Department that he could leave the CIS form for retyping, that it would then be mailed out for his signature and oath, and that there would be "no problem" with this procedure. The Department in fact had followed that procedure and accepted unperfected charges in thousands of cases. Following its own rules, the Department did not act on the charge until it had been perfected. The hospital was not prejudiced in any way, nor was it faced with a stale claim. Notice of the unperfected charge was sent to the hospital

upon its receipt. Gonzalez supplied his notarized signature within a reasonable time after receiving the typed charge in the mail.

We do not suggest that the oath requirement is a technicality in the sense that it need never be supplied or that it is an insignificant part of the charge. Requiring a claimant to make his allegations under oath may minimize frivolous filings. However, the Department's own rules permit the filing of charges without notarization and permit liberal amendment to cure technical omissions. Since Gonzalez filed his unperfected CIS form within the 180-day period, it was not in fact untimely because the subsequent filing of the oath or affirmation "relates back" to the initial filing.

Sound support for this interpretation is found in *Choate v. Caterpillar Tractor Co.* (7th Cir. 1968), 402 F.2d 357. The Seventh Circuit held that the oath requirement for a charge under Title VII was not a jurisdictional prerequisite to maintaining the claim. The court expressly cited the EEOC's regulation which allows aggrieved parties to amend their complaints "to cure technical defects or omissions, including failure to swear to the charge". (402 F.2d at 360, *quoting* 29 C.F.R. §1601.11 (1968).) Amendments made under this regulation relate back to the original filing date. 402 F.2d 357, 360.

As long as the original charge is filed within the 180-day period, as it was here, a liberal amendment policy makes sense. The hospital received prompt notice but did not have to act on the unperfected charge. If Gonzalez had never supplied the oath, nothing more would have happened. Moreover, if Gonzalez had waited an unreasonable amount of time before furnishing the oath he may not have been entitled to proceed on his claim. Under equitable principles, a claimant attempting to benefit from a tolling or other abatement of the 180-day period might well find himself barred by laches if he failed to act expeditiously.

Here, no facts indicate that Gonzalez intended to abandon his claim. Within a reasonable time after receiving the typed charge from the Department, he furnished his oath. Whether he could or should have gotten his CIS form on file before the 176th day is a factual matter that is immaterial to the legal issues raised. The ALJ accepted Gonzalez' unrebutted testimony

as to the factual circumstances surrounding the filing. The Commission's comments to the effect the Gonzalez' conduct was responsible for the tardy filing are not probative on the ultimate issues in this case and may be disregarded.[3]

Based on our reading of the statute and the pertinent authorities, we hold that the CIS charge, plus the later supplied oath, satisfied Section 7-102 of the Act in this case. Accordingly, the charge was not untimely filed.

For the foregoing reasons, we reverse the Commission's order and remand this cause for proceedings on the merits.

REVERSED and REMANDED

JOHNSON and McMORROW, JJ., concur.

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[3] The Commission stated, "Although the Department of Human Rights was taking the position that the Complainant's CIS form was a timely charge, the Complainant, who was represented by counsel, had no right to rely on that interpretation. The Complainant's counsel had the duty to read the statute, and comply with its plain meaning."